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Fair Housing's Third Act: American Tragedy or Triumph?

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Fifty-two years ago, Congress enacted a one-of-a-kind civil rights directive. It requires every federal agency—and state and local grantees by extension—to take affirmative steps to undo segregation. In 2020, this overlooked Fair Housing Act provision—the “affirmatively furthering fair housing” or “AFFH” mandate—had heightened relevance. Perhaps most visible was Donald Trump’s racially charged “protect the suburbs” campaign rhetoric. In an appeal to suburban constituents, his administration replaced a race-conscious fair housing rule with a no-questions-asked regulation that elevates local control above civil rights.

The maneuver was especially stark as protesters marched in opposition to systemic racism’s many forms. In this moment of racial awakening, it is critical to revisit how neighborhood segregation affects nearly all aspects of American life. We live in a racist ecosystem, and racial segregation is its defining feature. Segregation’s profound influence reinforces the importance of the AFFH mandate as a remedial tool.

Drawing on recent events as a case study, this Article examines the AFFH mandate’s potential to be our country’s most effective anti-segregation tool. First, this Article accounts for the mandate’s historic failures. Second, it demonstrates why the Act must be amended to instill a durable compliance process at the local level.

As currently configured in statute, the mandate is profoundly inadequate to meaningfully reduce segregation. But if amended, it has the unleashed power to reduce segregation at the local level. This has critical real-world implications—new studies reveal that even incremental reduction of neighborhood segregation decidedly improves quality-of-life outcomes, from education to health to life expectancy.

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Decades after Congress announced the government's affirmative duty to undo it, housing segregation remains a profound collective problem that merits the resources necessary to systematically dismantle it. The stage is set for fair housing's third act.

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Nothing can be changed until it is faced.

– James Baldwin

INTRODUCTION

It's a common refrain: residential integration has never been tried in the United States—not on any meaningful scale. Cities remain hyper-segregated, often as divided or worse than the 1960s.¹ Its costs are staggering, spilling over into all aspects of American life, from the racial wealth gap to social determinants of health to GDP.² Racial segregation affects all U.S. communities by defining the landscape of opportunity. Segregation opens doors of opportunity to some and cruelly shuts them to others. Today, fifty-two years after passage of the Fair Housing Act, racial segregation remains

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1. Douglas S. Massey, *The Legacy of the 1968 Fair Housing Act*, 30 Soc. F. 578–83 (June 2015) (analyzing racial segregation from 1970 to 2010, and observing that twenty-one metropolitan areas remained hyper-segregated in 2010); *see also* DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID* 60–82, 203–04 (1993) (documenting historical patterns from 1970–1980); Michael D. M. Bader & Siri Warkentien, *The Fragmented Evolution of Racial Integration Since the Civil Rights Movement*, 3 Soc. Sci. 135–66 (2016) (documenting racial change in four metropolitan areas); RICHARD SANDER, YANA A. KUCHEVA & JONATHAN M. ZASLOFF, *MOVING TOWARD INTEGRATION* 1–10 (2018) (assessing the state of segregation and describing the patterns that reinforce it).
 2. *E.g.*, SANDER ET AL., *supra* note 1, at 335–52 (effects of segregation); Sam Fulwood III, *The Costs of Segregation and the Benefits of the Fair Housing Act*, in *THE FIGHT FOR FAIR HOUSING* 40–56 (Gregory D. Squires ed., 2018) (domestic and international empirical impact); Gregory Acs, et al., *The Cost of Segregation: National Trends and the Case of Chicago, 1990–2010*, URBAN INST. (March 2017), https://www.urban.org/research/publication/cost-segregation/view/full_report [<https://perma.cc/256H-HCHE>] (income, education, life expectancy, homicide rate); *The Cost of Segregation*, METRO. PLANNING COUNCIL 4–5 & n.1 (March 2017), <https://www.metroplanning.org/uploads/cms/documents/cost-of-segregation.pdf> [<https://perma.cc/Q5AL-STQM>] (gross domestic product); *see also* R.A. Hahn et al., *Civil Rights as Determinants of Public Health and Racial and Ethnic Health Equity: Health Care, Education, Employment, and Housing in the United States*, 4 SSM POPULATION HEALTH 17–24 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5730086/pdf/main.pdf> [<https://perma.cc/F7Z8-RMUK>] (social determinants of health); RICHARD ROTHSTEIN, *THE COLOR OF LAW* 180–83 (2017) (racial wealth gap).

a profound collective problem that merits the attention necessary to systematically dismantle it as a matter of federal policy.³

But how? This Article argues that we try something in earnest for the first time: systematic residential desegregation at a local level, guided and reinforced by federal law. To do so, we must first confront the reality that the primary legal tool for reducing segregation—the Fair Housing Act, as currently configured—is profoundly inadequate to the task. The Act features an affirmative duty to use public resources to dismantle

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3. It is critical to situate the meaning of residential “integration” in the context of the status quo. Some neighborhoods are starved of economic investment while others hoard wealth and opportunity. Thus, “integration” as used in this Article, is intended as a strategy—not the only strategy—to reduce place-based inequality. It is not intended as assimilationist. Likewise, separation and segregation are not understood or intended as inherently interchangeable concepts. Rather, this Article necessarily acknowledges, and seeks to overcome, the reality that there are vast differences in access to wealth and opportunity between segregated predominantly white and segregated predominantly Black neighborhoods. For a discussion of space racism, and the assumptions commonly associated with integration advocacy, see IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 166–80 (2019).

Stokely Carmichael wrote in 1966 that integration is a “subterfuge for the maintenance of white supremacy” premised on the “complete acceptance” that “blacks must move into a white neighborhood or send their children to a white school,” whereas he advocated for Black people to “become equal in a way that means something, and integration ceases to be a one-way street.” Stokely Carmichael, *What We Want*, N.Y. REV. BOOKS (Sept. 22, 1966). This tension between mobility-based integration and place-based community development persists a half-century later. *See generally*, EDWARD GOETZ, *THE ONE-WAY STREET OF INTEGRATION* (2019); *see also infra* note 222 (discussing the “balanced approach” that seeks to bridge the divide between place-based investment and mobility programs, a longstanding debate within the fair housing community). In the same article, Carmichael offers a vision in which integration does belong: when “integration doesn’t mean draining skills and energies from the ghetto into white neighborhoods . . . [t]hen integration becomes relevant.” Carmichael, *supra*.

This Article sits in that tension. Its integration-focused proposals are best viewed as an attempt at pragmatic policymaking that seeks to achieve the equitable distribution of resources across neighborhoods, inherently constrained by the existing legal framework and political will, among other limitations.

segregation, known as the “affirmatively further fair housing” or “AFFH” mandate.⁴

Despite this powerful mandate, compromise was baked into the Act at inception.⁵ While necessary for passage, critical concessions rendered enforcement of this affirmative mandate ineffectual.⁶ This Article’s first goal is to account for that failure. Only through exposing the Act’s design flaws can we unearth the enforcement gaps that abet local inertia and even fuel opposition. Ultimately, it is at the local level where progress must occur.⁷ Regrettably, history has proven that local compliance requires federal pressure and unremitting accountability.⁸ That federal-level accountability has not been forthcoming, largely due to the Act’s fundamental flaws.

The absence of federal accountability has allowed segregation to flourish when it did not have to, making desegregation harder today. Four developments converged to create the segregation we see today: (1) decades of official government redlining—i.e., the blanket denial of federally insured mortgages to communities of color⁹—with private lenders

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4. The provisions collectively known as the AFFH mandate are codified at 42 U.S.C. § 3608. Subsection 3608(e) requires the Secretary of the U.S. Department of Housing and Urban Development (HUD) to administer the department’s programs and activities “in a manner *affirmatively to further [fair housing] policies*.” 42 U.S.C. § 3608(e)(5) (2017) (emphasis added). Subsection 3608(d) broadly extends the obligation to “[a]ll executive departments and agencies.” 42 U.S.C. § 3608(d) (2017).
 5. *E.g.*, MASSEY & DENTON, *supra* note 1, at 187 (“When a fair housing act banning discrimination finally did pass Congress under unusual circumstances, it had its enforcement provisions systematically gutted as its price of enactment.”); *id.* at 195 (“[Post-enactment] persistence of residential segregation followed directly from inherent weaknesses that were built into the act as part of Senator Dirksen’s price of passage. Although the country had its fair housing law, it was intentionally designed so that it would not and could not work.”).
 6. *Id.*
 7. For a discussion of how local governments have created and maintained segregation, and their unrivaled power to deconstruct it, see JESSICA TROUNSTINE, *SEGREGATION BY DESIGN* 23–38 (2018).
 8. See generally Nikole Hannah-Jones, *Living Apart: How the Government Betrayed a Landmark Civil Rights Law*, PROPUBLICA (June 25, 2015), <https://www.propublica.org/article/living-apart-how-the-government-betrayed-a-landmark-civil-rights-law> [<https://perma.cc/YB8F-PVHZ>].
 9. Gregory D. Squires & Frank Woodruff, *Redlining*, in THE WILEY BLACKWELL ENCYCLOPEDIA OF URBAN AND REGIONAL STUDIES (Anthony Orum ed., 2019). For a

emboldened to follow suit,¹⁰ (2) the widespread use of racially restrictive covenants,¹¹ (3) the advent of extreme local control as illustrated by the proliferation of exclusionary zoning,¹² and (4) the creation of freeways—also using federal funds—that literally sequestered Black communities and facilitated easy suburban access for fleeing white residents.¹³ While these factors were in motion before the Act’s passage, they illustrate why the government needed to act expediently under the Act to circumvent the entrenchment of segregation patterns.¹⁴

pop culture telling of the history of redlining with over six million views, watch Adam Ruins Everything, *The Disturbing History of the Suburbs*, YOUTUBE (Oct. 4, 2017), <https://youtu.be/ETR9qrVS17g> [<https://perma.cc/ZL5F-WJTL>].

10. *E.g.*, Khristopher J. Brooks, *Redlining’s Legacy: Maps are Gone, But the Problem Hasn’t Disappeared*, CBS NEWS (June 12, 2020), <https://www.cbsnews.com/news/redlining-what-is-history-mike-bloomberg-comments/> [<https://perma.cc/57PE-5F2F>].
11. Although the Supreme Court rendered racially restrictive covenants judicially unenforceable in *Shelley v. Kraemer* in 1948, 334 U.S. 1, their widespread use continued between private parties. For a history of racially restrictive covenants in the Washington, D.C. area, see Sarah Shoenfeld & Mara Cherkasky, *The Rise and Demise of Racially Restrictive Covenants in Bloomingdale*, D.C. POL’Y CTR. (Apr. 3, 2019), <https://www.dcpolicycenter.org/publications/racially-restrictive-covenants-bloomingdale/> [<https://perma.cc/R3UK-XL34>]. Several mapping initiatives document how restrictive covenants operated across metropolitan areas, demonstrating how covenants contributed to the demographic patterns that remain in place today. *See, e.g.*, MAPPING PREJUDICE, <https://www.mappingprejudice.org> [<https://perma.cc/7BNN-BVZ6>] (Minneapolis); Seattle C.R. & Lab. Hist. Project, *Segregated Seattle*, U. WASH., <https://www.depts.washington.edu/civilr/segregated.htm> [<https://perma.cc/3LNZ-CG2A>] (Seattle).
12. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION* 104–10 (2004).
13. *Id.* at 113–15. Certainly, other factors contributed. Among them is white resistance to integration efforts, including the use of violence, and widespread intentional housing discrimination practices like steering, blockbusting, etc. *Id.* at 101–24.
14. *See, e.g.*, Hannah-Jones, *supra* note 8 (“Segregation would have been cut by half and possibly eliminated. The country would have been very different.”) (quoting Myron Orfield, University of Minnesota law professor and director of the Institute on Metropolitan Opportunity).

But the government did not act swiftly. Instead, it put its best tool—the AFFH mandate—back in the toolbox as segregation patterns hardened.¹⁵ After the Act, segregation briefly decreased then plateaued.¹⁶ The most substantial decline for most cities occurred between 1970 to 1980, followed by only modest decline.¹⁷ The national Dissimilarity Index—a uniform scale that quantifies segregation on a scale of 0 to 100, with higher scores reflecting higher segregation—dropped from 78 in 1970 to a score of 60 in 2010.¹⁸ Overall, desegregation has been “far from universal” and many metropolitan areas have experienced “stalled integration” at best.¹⁹ Today,

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15. See SANDER, *supra* note 1, at 139–41 (describing the 1970s as “the critical decade”); see also *id.* at 143–65 (analyzing implementation of the FHA in the 1970s).
 16. See, e.g., Massey, *supra* note 1, at 578 (“[D]eclining black-white segregation was far from universal and . . . many metropolitan areas displayed a pattern of ‘stalled integration.’”).
 17. SANDER, *supra* note 1, at 10, tab. 0.3 (explaining that in sixty metropolitan areas, progress in the 1970s was noticeably greater than in subsequent decades); *id.* at 139–65 (discussing the 1970s as “the critical decade” for implementing the Fair Housing Act); see also Massey, *supra* note 1, at 578–79, 582 (“Abundant evidence suggests that racial discrimination did not end with civil rights so much as go underground to become clandestine and less visible.”).
 18. *Id.* The Dissimilarity Index is a standard measure of segregation. On a scale of 0 to 1, the lowest score of “0” reflects the natural state of integration absent discrimination and “1” reflects complete segregation. See, e.g., U.S. CENSUS, *Racial and Ethnic Residential Segregation in the United States: 1980-2000*, at 119 (Aug. 2002), <https://www.census.gov/prod/2002pubs/censr-3.pdf> [<https://perma.cc/5YXJ-ET8L>]. Put another way, the Dissimilarity Index “captures the degree to which blacks and whites are evenly spread among neighborhoods in a city. Evenness is defined with respect to the racial composition of the city as a whole. If a city is 10% black, then an even residential pattern requires that every neighborhood be 10% black and 90% white. Thus, if a neighborhood is 20% black, the excess 10% of blacks must move to a neighborhood where the black percentage is under 10% to shift the residential configuration toward evenness.” MASSEY & DENTON, *supra* note 1, at 20.
 19. Massey, *supra* note 1, at 578 (citing John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census*, US 2010 (Mar. 2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf> [<https://perma.cc/7PB7-Q2V9>]); see also Douglas S. Massey & Jacob S. Rugh, *Segregation in Post-Civil Rights*

at least twenty-one cities remain hyper-segregated²⁰ and the vast majority of Black metropolitan residents live in “high” or “very high” segregation.²¹

This Article’s second goal is to demonstrate that the Act itself must be amended to instantiate a durable compliance process with the AFFH mandate at the local level. Regulation alone will not do. Since Congress passed the original Act in 1968 (the “first act”),²² it has only reopened the Act for substantive debate and amendment one time (the “second act”).²³ That was over thirty years ago. While the 1988 amendments made pivotal changes to anti-discrimination enforcement, they ignored the more visionary

America: Stalled Integration or End of the Segregated Century?, 11 DU BOIS REV. 2205, 05–32 (Fall 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4782806> [<https://perma.cc/A996-4ZE8>].

20. Massey, *supra* note 1, at 579–80. For a discussion of what constitutes “hyper-segregation,” see Tanvi Misra, *America Has Half as Many Hypersegregated Metros as It Did in 1970*, CITY LAB (May 21, 2015), <https://www.citylab.com/equity/2015/05/america-has-half-as-many-hypersegregated-metros-as-it-did-in-1970/393743/> [<https://perma.cc/6VPL-DNKU>] (defining a “hyper-segregated” city as meeting four of five segregation-related criteria).
21. SANDER et al., *supra* note 1 at 1–10.
22. Fair Housing Act, Title VIII of the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended at 42 U.S.C. §§ 3601–3619 (2017)).
23. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–3619 (2017)) (amending the original Act by adding two new protected classes—disability and familial status—and strengthening discrimination enforcement provisions by extending time to file a housing discrimination complaint from 180 days to two years, permitting prevailing plaintiffs to recover attorney’s fees and court costs, and significantly enhancing administrative enforcement procedures); *see also* ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW & LITIGATION §§ 5.3–5.4 (2019) (detailing amendments in historical context). To be clear, Congress has occasionally amended the Fair Housing Act by other legislation but has not reopened the Act to substantive debate to address the Act’s structural deficiencies, as this Article proposes. For instance, in 1974, Congress indirectly amended the Act in establishing the Community Development Block Grant program. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (1974) (inserting “sex” as a protected class into an assortment of federal housing laws). Congress also passed the Housing for Older Persons Act of 1995 (HOPA), which exempts certain forms of housing for older persons from familial status discrimination. Pub. L. No. 104-76, 109 Stat. 787 (codified as amended at 42 U.S.C. § 3607). None of these amendments modified the AFFH mandate.

integration mandate.²⁴ Strengthening the mandate, now a half-century old, is long overdue. The dispiriting reality is that the Act, if not amended, has little probability of dismantling residential segregation. If amended, however, the AFFH mandate holds unleashed potential. Its next iteration could be our most effective anti-segregation tool yet.

Part I looks back at an early but tragically flawed attempt by HUD to use the AFFH mandate to deconstruct racial segregation. Drawing from this history, this Section presents a legal analysis of the reasons the AFFH mandate has been ineffective at reducing segregation. Viewed today, it may seem little has changed in fifty years. The federal government continues to transfer billions of dollars to local jurisdictions without accountability.²⁵ Many jurisdictions spend their “automatic influx” of federal funds in ways that actually reinforce segregation.²⁶ It is here—steeped in ennui—that the prospect of amending the Fair Housing Act is shrouded in frustration, even apathy.

This Article offers a less deflated view. While the first two iterations of the Fair Housing Act had “slow and fitful” starts,²⁷ some dynamics have changed or are on the brink. Most notable is the now-repealed Obama-era AFFH regulation (“AFFH Rule”) promulgated by the U.S. Department of Housing and Urban Development (“HUD”) in 2015.²⁸ It embodied a long-awaited federal accountability framework that systematizes a local

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24. For a critique of the anti-discrimination mandate in the civil rights context, see ROBIN L. WEST, *CIVIL RIGHTS: RETHINKING THEIR NATURAL FOUNDATION* (2019) (discussing the limits and unintended consequences of a civil rights jurisprudence focused too narrowly on anti-discrimination and proposing a broader jurisprudence that draws on civil rights as founded in natural law).
 25. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., *COMMUNITY PLANNING AND DEVELOPMENT APPROPRIATIONS BUDGET*, https://www.hud.gov/program_offices/comm_planning/about/budget [<https://perma.cc/RMC2-HUZS>] (table of appropriations by year).
 26. Hannah-Jones, *supra* note 8 (describing through interviews local government attitudes and the federal government's response) (“But other communities with serious questions about fair housing continue to receive federal housing dollars, and fair housing officials say [HUD] still brushes civil rights concerns aside. One senior housing official pointed to New Orleans, which hasn't lost its block grant despite the Department of Justice lawsuit. ‘If that's not enough to reject a grantees' funding,’ he said. ‘Any finding from the fair housing office will not ever be sufficient.’”).
 27. MASSEY & DENTON, *supra* note 1, at 187.
 28. Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272 (July 16, 2015) (codified at 24 C.F.R. § 5.150–5.180 (2015)).

compliance process with an eye toward outcomes, explicitly recognizing that success requires training local governments to first identify barriers to integration then leveraging federal data and resources to overcome those barriers.²⁹

The AFFH Rule was a vital and positive step that illustrates what can and must be done to move forward. But any such regulation is unacceptably vulnerable to changing political winds when the White House changes hands. Segregation is too costly and too pervasive³⁰ to subject an AFFH regulation to the precarious one-step-forward, one-step-back rhythm of administrative rulemaking. The statute itself must be amended.

Part II examines the Trump Administration's assault on the AFFH mandate. It begins with a proposed revision that would have virtually eliminated the race-conscious elements of the AFFH Rule³¹ but ends in

29. *E.g., id.* at 42,272 ("Through this rule, HUD commits to provide states, local governments, public housing agencies (PHAs), the communities they serve, and the general public, to the fullest extent possible, with local and regional data on integrated and segregated living patterns, racially or ethnically concentrated areas of poverty, the location of certain publicly supported housing, access to opportunity afforded by key community assets, and disproportionate housing needs on classes protected by the Fair Housing Act. Through the availability of such data and available local data and knowledge, the approach provided by this rule is intended to make program participants better able to evaluate their present environment to assess fair housing issues such as segregation, conditions that restrict fair housing choice, and disparities in access to housing and opportunity, identify the factors that primarily contribute to the creation or perpetuation of fair housing issues, and establish fair housing priorities and goals.").

30. *See supra* note 2.

31. *See, e.g.,* Kriston Capps, *On Segregated Suburbs, Trump Says the Quiet Part Out Loud*, BLOOMBERG CITYLAB (July 2, 2020), <https://www.bloomberg.com/news/articles/2017-02-03/affirmatively-furthering-fair-housing-faces-its-fate?sref=QFCZ3YPm> [<https://perma.cc/LRE7-Y3GX>] ("As he's done time and time again, Trump said the quiet part out loud. The U.S. Department of Housing and Urban Development has taken numerous steps to undermine key rules and policies that promote desegregation as a requirement for jurisdictions that receive federal housing dollars. But under Housing Secretary Ben Carson, the agency has carefully framed those revisions in procedural terms—namely as ways to reduce the paperwork load for housing authorities. In his tweet, Trump essentially admitted that there's a different motive: Eliminating the rule will reduce the pressure on local governments to provide space and opportunity for Black families in affluent white

particular tragedy. President Trump rejected HUD's initially-proposed revisions because they did not go far enough to excise the federal government from state decision-making. So HUD went further. It skipped the notice-and-comment process altogether and issued a new rule (the "Replacement Rule") that repealed the Obama-era AFFH Rule entirely.³²

The Replacement Rule established a rational basis test for local planning, meaning that any conceivable pro-fair housing action will satisfy the AFFH mandate. This process essentially rubberstamps any local decision and allows jurisdictions to continue business as usual. There are no more federal fair housing requirements: no data analysis, no fair housing planning documents, and no HUD review. Years of progress were simply swept away.

Despite this backsliding, a vigorously enforced AFFH mandate remains a tool with striking potential, particularly in our current moment of collective racial reckoning. As this Section explains, neighborhood segregation is inextricably tied to many forms of racial injustice. To advance racial equity, we need a legal framework that addresses entrenched racial segregation affirmatively by normalizing local compliance, backed by federal resources and accountability.

Part III offers a vision for effective reform to redesign the Fair Housing Act as an affirmative tool to meet this moment. It proposes three statutory amendments: (1) incorporating the 2015 AFFH Rule's substantive components into the Act's statutory void, (2) establishing an explicit private right of action for AFFH enforcement, and (3) leveraging mobility programs and source-of-income protections to reinforce the AFFH mandate's integration objective.

In today's political climate, readers may be quick to dismiss as impractical any proposal requiring congressional action. Anticipating these critiques, Part III takes a hard look at these ostensibly idealistic proposals.

neighborhoods."); Cassidy Wang, *HUD Proposal Could Reduce Protections Against Discrimination, Housing Advocates Say*, SOJOURNERS (Mar. 13, 2020), <https://sojo.net/articles/hud-proposal-could-reduce-protections-against-discrimination-housing-advocates-say> [https://perma.cc/MGR4-BCVZ] (noting the proposed rule only mentions "segregation" two times in its 84-page text while the current rule mentions it 109 times).

32. For authority to bypass the notice-and-comment process, HUD cited an APA provision exempting "matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts." 85 Fed. Reg. 47,901, 47,904 (citing 5 U.S.C. § 553(a)(2)) ("Because this rule applies only to the AFFH obligations of grantees, it is exempt under the APA."). This claim appears ripe for legal challenge.

It demonstrates that dual strategies are prudent and necessary—not unrealistic—even in an unreceptive political climate. Fair housing advocates must defensively protect vulnerable achievements³³ while positioning themselves to materially advance AFFH mandate enforcement when the opportunity arises. Part III concludes with a look at several voluntary measures that local grantees could adopt to mitigate residential segregation in the absence of broader reform.

Opportunity may be upon us. *First*, seismic shifts have emerged in the political atmosphere—from a global pandemic to economic recession to civil unrest and widespread protests in response to racist policing and the death of George Floyd.³⁴ Many of the inequities highlighted by protesters are inextricably connected to residential segregation, as discussed in Part II. These shifts point to a new line in the sand: commitment to transformative, anti-racist policies designed to deconstruct segregation or not. *Second*, we are at the dawn of a new presidential administration. President-elect Joe Biden has identified closely with what his campaign called the “Obama-Biden Administration’s AFFH Rule.”³⁵ Even before widespread protests in 2020, presidential candidates competed to propose policies addressing

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33. For a comprehensive list of civil and human rights rollbacks under the current administration, see *Trump Administration Civil and Human Rights Rollbacks*, Leadership Conf. on Civ. & Hum. Rts., <https://civilrights.org/trump-rollbacks/> [<https://perma.cc/E9M5-TRPX>] (last accessed April 11, 2020).
 34. For opinion articles that explore potential connections between residential segregation and current protests, see Myron Orfield & Will Stancil, Opinion, *George Floyd and Derek Chauvin Might as Well Have Lived on Different Planets*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/george-floyd-minneapolis-segregation.html> [<https://perma.cc/S2MP-3LG7>]; David Brooks, Opinion, *How to Do Reparations Right*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/united-states-reparations.html> [<https://perma.cc/2TXD-SM3P>] (“The neighborhood is the unit of change.”).
 35. *E.g.*, The Biden Plan for Investing in Our Communities Through Housing, <https://joebiden.com/housing> [<https://perma.cc/LU4Y-DYZB>] (“Biden will implement the Obama-Biden Administration’s Affirmatively Furthering Fair Housing Rule requiring communities receiving certain federal funding to proactively examine housing patterns and identify and address policies that have a discriminatory effect.”).

racial disparities.³⁶ Likewise, a surprising degree of bipartisan support for housing mobility programs has emerged in Congress.³⁷

Over thirty years later, the national stage is set for fair housing's third act. Further inaction threatens to prolong America's tragic segregation saga, but this Article's proposed reforms could tender our most effective anti-segregation legislation yet.

I. WHERE WE'VE BEEN: A LEGACY OF INACTION

History is telling. It has taken eight presidents, fourteen HUD secretaries, and nearly half a century for HUD to promulgate a regulation

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36. Democratic presidential candidates have proposed various policies to address segregation's legacy. *See, e.g.*, American Housing & Economic Mobility Act of 2019, S. 787, 116th Cong. § 201 (2019) (Sen. Elizabeth Warren) (providing down-payment grants to first-time homebuyers living in formerly redlined or officially segregated areas); Housing, Opportunity, Mobility, and Equity (HOME) Act of 2018, S. 3342, 115th Cong. § 2 (2018) (Sen. Cory Booker) (amending the 1974 Housing and Community Development Act to require grant recipients to develop a strategy to support "inclusive zoning policies"); *People First Housing*, JULIÁN CASTRO 2020 (June 17, 2019), <https://www.julianforthefuture.com/news-events/people-first-housing-part-1/> [<https://perma.cc/5WL5-WUV5>] (Julián Castro, former Secretary of HUD) (proposing reforms to local zoning and "an affirmative implementation of policies that further the purposes of the Fair Housing Act to address racial disparities in local zoning").
 37. *See* Consolidated Appropriations Act of 2019, Pub. L. No. 116–6, 133 Stat. 13, 438 (2019) (allocating with bipartisan support \$28 million to a new mobility demonstration program, including \$5 million in Housing Choice Voucher assistance). For a discussion of new research on the positive outcomes of even moderately reduced racial and ethnic segregation, see SANDER, *supra* note 1, at 1–14, and the long-term intergenerational benefits of integration, see Raj Chetty et al., *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. EC. REV. 855 (Apr. 2016), https://scholar.harvard.edu/files/lkatz/files/chk_aer_mto_0416.pdf [<https://perma.cc/ALF6-GG88>]; Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates* (2015) (unpublished manuscript), http://scholar.harvard.edu/files/hendren/files/nbhds_paper.pdf [<https://perma.cc/V7BH-AEGU>].

defining the contours of the AFFH mandate.³⁸ Most of those years, the federal government sidestepped any effort to carry out its AFFH duties.³⁹ Many observers blame the government's "well-documented record of foot-dragging with respect to its affirmative mandate"⁴⁰ for the lack of progress in residential integration.⁴¹ But this Article goes further, asking from a legal perspective *why* the government dragged its feet for so long and *how* it got away with it.

To correct a problem, one must identify its true cause. This Part looks beyond historical inertia to scrutinize how the Act, in its current form, is ill-suited to reduce segregation-in-fact. The key to effective reform is understanding its defects. Only through examining the Act's design flaws—historically and empirically through case study—can we unearth the enforcement gaps that must be addressed to replace inertia with a culture of compliance among federal grant recipients.

A. *Origins*

The AFFH mandate is best understood as Congress's acknowledgement of the government's role as an architect of segregation. Throughout the twentieth century in particular, the federal government, through a well-documented pattern of interventions, engineered and perpetuated racial

38. Counting from 1969 to 2015, Presidents Nixon to Obama and Secretaries George Romney to Julián Castro (or a total of eighteen HUD secretaries when counting four acting secretaries). See Dep't of Hous. & Urban Dev., *HUD Secretaries*, <https://archives.hud.gov/pastsecretaries.cfm> [<https://perma.cc/84GL-PW4D>] (last visited November 1, 2020).

39. *E.g.*, Abdallah Fayyad, *The Unfulfilled Promise of Fair Housing*, ATLANTIC, (Mar. 31, 2018), <https://www.theatlantic.com/politics/archive/2018/03/the-unfulfilled-promise-of-fair-housing/557009/> [<https://perma.cc/JMW8-CBAB>] (chronicling the government's track record); Hannah-Jones, *supra* note 8 ("Over the next four decades . . . a succession of presidents—Democrats and Republicans alike—followed Nixon's lead, declining to use the leverage of HUD's billions to fight segregation.").

40. Massey, *supra* note 1, at 578.

41. *See, e.g.*, Michelle Adams, *The Unfulfilled Promise of the Fair Housing Act*, NEW YORKER (Apr. 11, 2018), <https://www.newyorker.com/news/news-desk/the-unfulfilled-promise-of-the-fair-housing-act> [<https://perma.cc/V5ZR-TKXL>]; Fayyad, *supra* note 39.

segregation.⁴² Interventions ranged from redlining to mandatory segregation of government housing to countless other policies that subsidized segregation.⁴³

In the 1960s, passage of a fair housing bill was far from inevitable. Housing was arguably the most difficult civil rights frontier.⁴⁴ In 1964, Congress prohibited discrimination on the basis of race in voting, public accommodations, public facilities, public education, federally assisted programs, and employment—but not housing.⁴⁵ Time and again, obstinate opponents stymied efforts to prohibit housing discrimination.⁴⁶

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42. See, e.g., ROTHSTEIN, *supra* note 2; Katie Nodjimbadem, *The Racial Segregation of American Cities Was Anything But Accidental*, SMITHSONIAN MAG. (May 30, 2017), <https://www.smithsonianmag.com/history/how-federal-government-intentionally-racially-segregated-american-cities-180963494> [<https://perma.cc/SXN5-GKKM>] (“In some cities, it’s a division based around infrastructure, as with Detroit’s 8 Mile Road. In other cities, nature—such as Washington, D.C.’s Anacostia River—is the barrier. Sometimes these divisions are man-made, sometimes natural, but none are coincidental.”).
 43. E.g., Richard Rothstein, *Public Housing: Government-Sponsored Segregation*, AM. PROSPECT (Oct. 11, 2012), <https://prospect.org/article/public-housing-government-sponsored-segregation/> [<https://perma.cc/9JTD-RM92>]; see also ROTHSTEIN, *supra* note 2.
 44. See, e.g., WALTER MONDALE & DAVE HAGE, *THE GOOD FIGHT: A LIFE IN LIBERAL POLITICS* 55–68 (2010) (discussing the politics of getting a fair housing bill through Congress in the 1960s).
 45. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended throughout U.S. Code Title 42) (2017).
 46. For a detailed history of the legislative struggle to pass fair housing legislation, see Bruce Ackerman, *We the People* Vol. 3: *The Civil Rights Revolution*, 200-05 (2014); Charles M. Lamb, *Housing Segregation in Suburban America Since 1960: Presidential and Judicial Politics* 26–35 (2005); Massey & Denton, *supra* note 1, at 187-94. Vice President Walter Mondale, who was the Act’s co-sponsor and floor manager in the U.S. Senate, later drew this distinction between fair housing and civil rights in the public sphere of voting and public accommodations: “[Fair housing] came right to the neighborhoods across the country. This was civil rights getting personal.” Hannah-Jones, *supra* note 8. See also Sander et al., *supra* note 1 (describing how fair housing had the lowest public support among white citizens); *Fifty Years of “The People v. HUD,” Poverty & Race Research Action Council* (Feb. 2018), <https://prrac.org/pdf/HUD50th-CivilRightsTimeline.pdf> [<https://perma.cc/V9U4-MWA9>] (documenting landmark moments in fair housing history, including the U.S. Senate’s 1949 rejection of the “Bricker-Cain” amendment that would have prohibited racial segregation in public housing).

The turning point was early 1968. Three events in quick succession opened the door. First, Everett Dirksen, a prominent senior senator from Illinois, changed his position to supporting a watered-down measure.⁴⁷ Second, a day later, the National Advisory Commission on Civil Disorders—the Kerner Commission—released a damning report on its investigation into the 1967 race riots and civil unrest.⁴⁸ It made headlines as an indictment of white America, assigning primary blame to segregated neighborhoods and unequal access to economic opportunity.⁴⁹ Third, on April 4, 1968, Dr. Martin Luther King, Jr. was assassinated, setting off riots across the country.⁵⁰ As smoke billowed from neighborhoods around the Capitol, Congress finally passed its first comprehensive fair housing bill.⁵¹

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47. See, e.g., ACKERMAN, *supra* note 46, at 200-05; LAMB, *supra* note 46, at 40-41; MASSEY & DENTON, *supra* note 1, at 193-94. For further discussion of Senator Dirksen's previous position—that fair housing legislation was unconstitutional to the extent that it prohibited private conduct—see ACKERMAN, *supra* note 46, at 200-14, which describes the evolution of Senator Dirksen's stance on fair housing and compares his position to Justice Potter Stewart's later majority opinion in *Jones v. Mayer*, 392 U.S. 409 (1968).
48. See LAMB, *supra* note 46, at 41; MASSEY & DENTON, *supra* note 1, at 193.
49. See REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 1 (1968) (describing the United States as "moving toward two societies, one black, one white—separate and unequal"); see also Susan T. Gooden & Samuel L. Myers, *The Kerner Commission Report Fifty Years Later*, 4 RUSSELL SAGE FOUND. J. SOC. SCI. 1 (2018) (describing the Kerner Commission Report's findings and its importance in U.S. history); see generally STEVEN M. GILLON, *SEPARATE AND UNEQUAL: THE KERNER COMMISSION AND THE UNRAVELING OF AMERICAN LIBERALISM* (2018) (describing the racial politics that influenced the report's drafting and ultimate rejection by President Johnson and the political right).
50. See ACKERMAN, *supra* note 46, at 205; LAMB, *supra* note 46, at 41-43; MASSEY & DENTON, *supra* note 1, at 194. Some scholars dispute the common narrative that Dr. King's assassination was the principal turning point. For instance, Bruce Ackerman explains that "[t]his is a mistake. While the shocking news did propel a rapid House vote on April 10, all the hard work had been done beforehand. King's tragic death endowed the birth of the landmark statute with a terrible solemnity, but it should not be used to trivialize the commitment of the American people to a constructive response to the escalating violence." Ackerman, *supra* note 46, at 205; see also SANDER et al., *supra* note 1, at 135 (noting that "[a] widespread legend" about the Fair Housing Act is that Congress passed it in response to King's assassination when "[i]n reality, by far the hardest challenge facing the bill was to get it through the Senate, and that happened several weeks before King's death").

In it, Congress set forth two distinct but complementary mandates: (1) an anti-discrimination mandate, requiring equal treatment on the basis of race, color, national origin, and religion (and later sex, familial status, and disability) and (2) an affirmative mandate that requires the federal government to use its resources to deconstruct segregated housing patterns.⁵² The latter—the AFFH mandate—boldly memorializes Congress’s directive that the government use its resources to reduce segregation by declaring that all executive departments and agencies “*shall administer their programs and activities relating to housing and urban development . . . in a manner affirmatively to further the purposes of [fair housing].*”⁵³ It is this tongue-twister that earned it the nickname the “AFFH” mandate.

To date, the AFFH mandate has received considerably less attention in academic literature, legislation, or policy advocacy than its sibling non-discrimination mandate.⁵⁴ Nonetheless, there is little question that Congress intended to do more than simply prohibit discrimination.⁵⁵

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51. Title VIII through IX of the Civil Rights Act of 1968 are commonly known as the Fair Housing Act. Pub. L. 90-284, 82 Stat. 73 (enacted April 11, 1968) (codified as amended at 42 U.S.C. §§ 3601–3631). For a detailed history and maps of the April 1968 riots in Washington D.C., see *The Four Days in 1968 that Reshaped D.C.*, WASH. POST (Mar. 27, 2018), <https://www.washingtonpost.com/graphics/2018/local/dc-riots-1968> [<https://perma.cc/UNC3-ZHEC>].
 52. Raphael Bostic & Arthur Acolin, *Affirmatively Furthering Fair Housing: The Mandate to End Segregation*, in *THE FIGHT FOR FAIR HOUSING 190-91* (Gregory D. Squires ed., 2018) (describing the dual mandates). The legislative record contains multiple examples of sponsor statements on the purpose of the integration mandate. *E.g.*, 114 CONG. REC. 2527-28 (1968) (statement of Sen. Brooke) (“[R]arely does HUD withhold funds or defer action in the name of desegregation. In fact, if it were not for all the printed guidelines the housing agencies have issued since 1964, one would scarcely know a Civil Rights Act had been passed.”); 114 CONG. REC. 3422 (1968) (statement of Sen. Mondale) (describing one of the Act’s purposes as replacing ghettos with “truly integrated and balanced living patterns”).
 53. 42 U.S.C. § 3608(d) (emphasis added).
 54. See Bostic & Acolin, *supra* note 52, at 191 (“From an institutional perspective, the mandate to affirmatively further fair housing has been far less invested in.”).
 55. See Robert G. Schwemm, *Overcoming Structural Barriers to Integrated Housing: A Back-to-the-Future Reflection on the Fair Housing Act’s*

Federal courts weighed in, interpreting the AFFH mandate to require the government to take affirmative steps to reduce segregation.⁵⁶ “Every court that has considered the question [has held that] Title VIII imposes upon HUD an obligation to do more than simply refrain from discrimination (and from purposely aiding discrimination by others).”⁵⁷ The AFFH mandate “reflects [Congress’s] desire to have HUD use its grant programs to assist in ending discrimination and segregation, to the point where the supply of genuinely open housing increases.”⁵⁸ By the 1980s, a critical mass of courts had opined that the AFFH mandate requires affirmative government action to deconstruct residential segregation—period. Hard stop.⁵⁹

‘Affirmatively Further’ Mandate, 100 Ky. L.J. 125, 126–30 (2012) (detailing the AFFH mandate’s legislative history).

56. See *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1124 (2d Cir. 1973); *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809, 820–21 (3d Cir. 1970).
57. *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 155 (1st Cir. 1987) (then-First Circuit judge Stephen Breyer). For further discussion of early appellate jurisprudence, see Robert G. Schwemm, *supra* note 55, at 137–44; Timothy M. Smyth, Michael Allen & Marisa Schnaith, *The Fair Housing Act: The Evolving Regulatory Landscape for Federal Grant Recipients and Sub-Recipients*, 23 J. AFFORDABLE HOUSING & COMM. DEV. LAW 231, 233–35 (2015).
58. *NAACP*, 817 F.2d at 155.
59. Schwemm, *supra* note 55, at 144 (“With the First Circuit’s decision [in the *NAACP* case], lower-court interpretations of § 3608 had established the following propositions: (1) HUD’s duties—and by extension those of its grantees—included not merely the avoidance of discriminatory action, but the requirement to take affirmative steps to achieve racial integration in the particular housing markets funded; (2) private enforcement of this mandate could not be done through the FHA’s normal enforcement mechanisms nor based on a private right of action under § 3608, but only through an APA-based claim; and (3) because of (2), courts could only set aside HUD actions that were determined to be an ‘arbitrary or capricious’ violation of § 3608, and such APA-based claims could only result in injunctive relief and not also damages or attorney’s fees.”).

B. More than a Missed Opportunity

Told by some, meaningful attempts to enforce the AFFH mandate began—and ended—with the Nixon Administration.⁶⁰ Most notorious is the showdown between President Nixon and his first Secretary of the Department of Housing and Urban Development, George Romney. Recognizing the mandate's potential, Romney resolved to leverage it to withhold federal funding from uncooperative cities.⁶¹ Romney's commitment to what was commonly called "open housing" was informed by his exposure as the governor of Michigan to extreme racial segregation, suburban white flight, and race riots.⁶²

Fearful that Nixon would rebuff his efforts, Romney largely operated in secret.⁶³ He saw federal funding as critical leverage for changing the decision-making calculus of segregated cities.⁶⁴ He knew they were dependent on federal resources—particularly for pricey public works like freeways and sewers.⁶⁵ In pursuit of fair housing, Romney used the newborn AFFH to threaten and ultimately to terminate federal grants if the local jurisdictions stubbornly refused to build low-income housing in defiant white neighborhoods.⁶⁶

60. See, e.g., ACKERMAN, *supra* note 46, at 218–23; LAMB, *supra* note 46, at 56–107 (2005).

61. See LAMB, *supra* note 46, at 84–94; see also *id.* at 57 ("Romney may have actually pressed harder to achieve suburban housing integration than any other prominent federal official of the 1970s, the 1980s, or the 1990s.").

62. See *id.* at 56–57, 85, 104; Hannah-Jones, *supra* note 8.

63. E.g. LAMB, *supra* note 46, at 69–73.

64. *Id.*

65. Hannah-Jones, *supra* note 8 (quoting Myron Orfield, University of Minnesota law professor and director of the Institute on Metropolitan Opportunity, "Romney recognized these places got a lot of stuff from the federal government. And Romney said if the federal government is going to build you a new freeway and sewer systems—the government was footing about 80 percent of the cost—you are not going to build communities at the end of those freeway and sewer systems for only affluent white people.").

66. *Id.* at 84–94; Hannah-Jones, *supra* note 8.

Eventually, President Nixon received complaints from southern and suburban leaders, two key voting constituencies.⁶⁷ He reacted swiftly, shutting Romney out of his inner circle.⁶⁸ By 1970, Romney was forced to abandon his initiative and resigned at the end of Nixon's first term.⁶⁹ Romney proved that the AFFH mandate has—or could have—teeth, if the federal government put its weight behind it. But his approach was rejected by a president who feared being seen as an “integrator” on Election Day.⁷⁰

With Romney out, Nixon went rogue. He announced that he, not HUD, would set national fair housing policy.⁷¹ He instructed his counsel's office to research how narrowly he could construe the AFFH mandate.⁷² Nixon's counsel set out to craft an interpretation that only required the federal government to intervene to address overt acts of discrimination.⁷³ But, tellingly, when legal counsel reviewed the case law, it concluded that Nixon's preferred approach contravened the Act.⁷⁴ Federal courts had

67. *E.g.* LAMB, *supra* note 46, at 91 (southern leaders); *id.* at 95 (suburban vote); *see also* CHRISTOPHER BONASTIA, KNOCKING ON THE DOOR: THE FEDERAL GOVERNMENT'S ATTEMPT TO DESEGREGATE THE SUBURBS 101 (2006) (emphasizing that Nixon “risked alienating white suburban supporters already angry about school busing initiatives”).

68. Massey, *supra* note 1, at 577 (quoting Nixon's statement to his chief of staff: “just keep [Romney] away from me”); LAMB, *supra* note 46, at 130–35 (describing Ehrlichman's memo to Nixon that referred to suburban integration as “a serious Romney problem which we will apparently have as long as he is there” and Nixon's scrawled note on the memo's margin: “Stop this one”).

69. LAMB, *supra* note 46, at 129, 130, 135.

70. Hannah-Jones, *supra* note 8.

71. LAMB, *supra* note 46, at 57, 107, 157–64 (telling the story of how Nixon centralized fair housing decision-making).

72. Massey, *supra* note 1, at 577 (“[T]his country is not ready at this time for either forcibly integrated housing or forcibly integrated education.”).

73. LAMB, *supra* note 46, at 107, 161–62 (collecting a timeline of Nixon's fair housing activity); *id.* at 163–64 (“In an abstract sense, Nixon seemed to agree with the most basic principles laid down by the Fair Housing Act. In reality, his interpretation of the act was literal and cramped, making aggressive enforcement impossible.”); Hannah-Jones, *supra* note 8 (“Nixon decided that he, not HUD, would set the nation's policy on fair housing.”).

74. *See* Hannah-Jones, *supra* note 8 (describing special counsel Leonard Garment's attempt to craft a strategy “consistent with both the courts’

already interpreted the AFFH mandate as an “affirmative” and ongoing obligation to redress segregation.⁷⁵

Displeased, Nixon’s domestic adviser, John Ehrlichman, went shopping for a second opinion.⁷⁶ He found a lawyer in the president’s executive office who opined that the government could restrict enforcement to “cases of individual discrimination” and thereby side-step problematic systemic issues like exclusionary zoning that had the effect of perpetuating racial exclusion.⁷⁷ Even so, the executive office opinion too warned that while that its interpretation would “avoid any hint of ‘forced integration’ . . . [it] may not fulfill the Government’s obligation under the law.”⁷⁸ Relying on the executive office opinion—and ignoring its caution—Nixon ordered HUD to stop all efforts to pressure local jurisdictions to integrate housing.⁷⁹

Nixon’s recalcitrance set the tone for decades. He countenanced federal abdication of its affirmative duty to deconstruct the segregation it built.⁸⁰

interpretations of the law and Nixon’s political needs,” which he ultimately concluded was not possible).

75. *Id.*; see also *supra* notes 56–59 (citing early case law).
76. Hannah-Jones, *supra* note 8. For closer look at Romney’s initiatives and his tense relationship with the Nixon White House, see KEEANGA-YAMAHTTA TAYLOR, *RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOMEOWNERSHIP* 93–131 (2019).
77. Hannah-Jones, *supra* note 8 (detailing Ehrlichman’s solicitation of attorney Tom Stoel in the President’s executive office, who argued “the government could restrict enforcement of the law to ‘cases of individual discrimination’ and need not get involved in zoning issues or press communities to build affordable housing,” as it would “‘avoid any hint of forced integration’” but “‘may not fulfill the Government’s obligation under the law.’”); see also LAMB, *supra* note 46, at 146–47 (describing how Nixon’s June 1971 fair housing policy statement narrowly construed the AFFH mandate).
78. Hannah-Jones, *supra* note 8; see BONASTIA, *supra* note 67, at 101, 190 n.30 (citing a memorandum from Tom Stoel to Leonard Garment).
79. Hannah-Jones, *supra* note 8 (“With that, the federal government’s only large-scale effort to integrate the segregated suburbs it helped create sputtered to a close. The Fair Housing Act was just four years old.”); LAMB, *supra* note 46, at 107, 157–64.
80. *E.g.* LAMB, *supra* note 46, at 165 (“The politics of suburban segregation did not end after Richard Nixon left the White House on August 9, 1974. Instead, Nixon’s influence in fair housing persists into the twenty-first century . . . Nixon’s basic suburban housing policy has survived five subsequent presidents and remains the policy of HUD.”).

For nearly half a century, the one-word history of the AFFH mandate has been “inaction.” But this legacy is more than a missed opportunity. As discussed in Part II, the steep cost we’re paying for that inaction is today’s entrenched segregation.

C. *Absent Compliance Norm*

The AFFH mandate’s failures are not entirely attributable to inaction. The statute’s original flaws are also behind that legacy.⁸¹ Foremost is the mandate’s implied enforcement mechanism—the exclusively HUD-controlled spigot of federal funding. A unifying theme across five decades is that HUD has rarely threatened to withhold funding, let alone carried out such a threat.⁸² Consequently, local jurisdictions perceive federal funding as an “automatic influx” of resources, free from accountability.⁸³ Had the original statute spelled out the AFFH mandate in more detail, HUD may have been less reticent to terminate funding. Even so, the AFFH mandate suffers from other flaws, notably its exclusive reliance on HUD as AFFH enforcer.

81. The Fair Housing Amendments Act of 1988 addressed enforcement of the anti-discrimination mandate but did not alter the AFFH integration mandate. *See supra* notes 23-24.

82. *See, e.g.,* Hannah-Jones, *supra* note 8 (noting the author’s investigation revealed “only two occasions since Romney’s tenure in which [HUD] withheld money from communities for violating the Fair Housing Act. In several instances . . . HUD has sent grants to communities even after they’ve been found by courts to have prompted segregated housing or been sued by the U.S. Department of Justice”); *see also Affirmatively Furthering Fair Housing at HUD: A First Term Report Card*, POVERTY & RACE RESEARCH ACTION COUNCIL 3–5 (Mar. 2013), <https://prrac.org/pdf/HUDDFirstTermReportCardPartII.pdf> [<https://perma.cc/7APN-MPAH>] (describing two instances in which HUD threatened to withhold funds); Nikole Hannah-Jones, *Westchester County Could Lose Millions for Fair Housing Failures*, PROPUBLICA (Mar. 28, 2013), <https://www.propublica.org/article/westchester-county-could-lose-millions-for-fair-housing-failures> [<https://perma.cc/TB9X-WZPQ>] (“The actual stripping of funds—they have been frozen for years—would be an unprecedented move for an agency long criticized for its failures to enforce federal housing law.”).

83. Hannah-Jones, *supra* note 8 (describing how one Wisconsin community continues to receive its “automatic influx” of HUD dollars despite a HUD investigation into allegations that it allowed certain communities to block rental housing in certain all-white neighborhoods to exclude Black and Hispanic renters).

This Section examines the mandate's frail enforcement features. It traces the mandate's evolution, ultimately arriving at the 2015 AFFH Rule.

Three principal problems emerge from this chronology: First, there is not—and never has been—a culture of compliance among local jurisdictions.⁸⁴ Even after fifty years, there is no basic norm among grantees that they are required to routinely identify, evaluate, and use its resources to overcome barriers to fair housing.⁸⁵ Second, the statutory text lacks both meaningful definitions and an accountability framework. Virtually all substantive content has been promulgated by rulemaking. While administrative regulations are a starting place, they are vulnerable to revision under thin pretext, as illustrated in the case study. Third, there is

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84. This Article uses interchangeably the terms “local jurisdictions,” “grantees,” and “federal funding recipients,” to refer to the approximately 1,200 jurisdictions that receive federal funds from HUD in the form of grants, such as the Community Development Block Grants (CDBGs). *See Community Development Block Grant Program*, U.S. DEP’T OF HOUS. & URB. DEV., https://web.archive.org/web/20200114212417/https://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs (identifying 1,209 units of local government that receive CDBG funds, including states, counties, cities, and smaller units of local government).
85. Barriers, in this context, are elements that restrict access to opportunity based on protected characteristics. *See, e.g.*, 24 C.F.R. § 5.152 (2020) (defining “Affirmatively furthering fair housing”). Common examples cited by HUD include “burdensome governmental processes, the concentration of substandard housing stock in specific areas, or restrictions based on the source of a tenant’s income” (e.g. landlords who refuse to rent to tenants who pay rent with government assistance). *Affirmatively Furthering Fair Housing*, 85 Fed. Reg. 2041, 2043 (Jan. 14, 2020). One of the most common culprits is exclusionary zoning. Restrictive zoning ordinances—whether they limit density, set minimum lot sizes or otherwise—operate as a barrier to entry for certain races even if they are race-neutral because, among other reasons, race is correlated with income level, which is often correlated with type of housing that is zoning-restricted. One researcher describes the correlation as follows: “A major cause of racial segregation is already known: zoning regulation. Zoning regulation segregates by race because race is frequently correlated with income. Zoning segregates by income through density limits, minimum lot sizes, and by reducing the supply of housing in cities, thereby creating regional housing affordability issues that push low-income racial minorities out.” Vanessa Brown Calder, *What Secretary Carson Should Know about Affirmatively Furthering Fair Housing*, CATO INST. (May 10, 2018), <https://www.cato.org/blog/what-secretary-carson-should-know-about-affirmatively-furthering-fair-housing-affh> [<https://perma.cc/86UA-JEPV>].

no express private right of action to enforce local AFFH compliance. Thus, when HUD looks away, no one else has power to compel local action.

This Section emphasizes the critical need for the federal government to cultivate a new norm among local grantees—a routinized process that requires local planners to assess and address that community’s impediments to fair housing. This Article begins at the natural starting point for fostering such a norm—process, not immediate or measurable outcomes. While outcomes are the desired result, process is the first step in norm-setting, which is necessary for sustained, measurable outcomes.

A norm requires some form of deterrence, meaning it requires (1) clear expectations (2) backed by material consequences. To date, the AFFH mandate has only been enforced by perfunctory attempts at nominal compliance, without meaningful follow-through. In an average year, HUD transfers millions of dollars to local jurisdictions in the form of community development funds.⁸⁶ Despite widespread noncompliance, HUD rarely exercises its principal leverage—federal funding.⁸⁷ Today, there exists

86. See *HUD Awards and Allocations*, U.S. DEP’T OF HOUS. & URBAN DEV., <https://www.hudexchange.info/grantees/allocations-awards> [https://perma.cc/7B8X-7QHD] (last visited Oct. 18, 2020). In fiscal year 2019, HUD distributions included CDBG grants (\$3.3 billion), HOME Investment Partnerships Program (HOME) grants (\$1.3 billion), Emergency Shelter Grants (\$280 million), and Housing Opportunities for Persons with AIDS (HOPWA) grants (\$378 million). *Id.* A Government Accountability Office report breakdown illustrates HUD’s similar program distributions in fiscal year 2009: CDBG grants (\$3.6 billion), HOME Investment Partnerships Program (HOME) grants (\$1.8 billion), Emergency Shelter Grants (\$1.7 billion), and Housing Opportunities for Persons with AIDS (HOPWA) grants (\$310 million), among others. See GAO REPORT, *infra* note 103 at 4–5. In both 2009 and 2019, these grants amounted to over \$5 billion dollars in free money to local jurisdictions, exclusive of even more sizable federal transportation grants. For additional discussion of the relevance of transportation grants, see *infra* note 215.

87. See *supra* notes 61–63; see also Bostic & Acolin, *supra* note 52 (discussing the mandate’s carrots and sticks). For an extensive discussion of the benefits of using funding cut-offs to promote state and local change among noncompliant grantees, see Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248 (2014). Institutional factors that may explain HUD’s reluctance to withhold funds include (1) the complicated relationship between the Fair Housing and Equal Opportunity office and other program offices (FHEO tends to lack internal clout); (2) concern that more local jurisdictions will decline federal funding,

virtually no deterrent for non-compliance. This Section accounts for that failure.

1. Analysis of Impediments (AI)

Until 2015, the government's attempts to enforce the AFFH mandate were nominal at best. In 1974, with the advent of Community Development Block Grants that transferred funds from federal to local coffers, HUD began requiring grantees to certify they would affirmatively further fair housing as a condition of funding.⁸⁸ But what it meant to "affirmatively further" fair housing—or the consequences for failure to do so—remained unclear. For decades, there were no notable HUD reprimands. It was not until twenty years later that President Clinton issued an executive order regarding grantee obligations.⁸⁹ It contained minimal new guidance but did direct the HUD secretary to promulgate regulations defining grantee obligations.⁹⁰

In 1995, HUD issued basic regulations, consolidating duties into a new mandatory process called an "Analysis of Impediments" of fair housing or "AI."⁹¹ The regulations defined a fund recipient's AFFH duty as affirmatively certifying it had performed three discrete obligations: (1) conduct an "analysis to identify impediments to fair housing choice within the jurisdiction," (2) take "appropriate actions to overcome the effects of any impediments identified through that analysis," and (3) maintain "records reflecting the analysis and actions" taken pursuant to the first two

which would decrease HUD's influence; and (3) the disconnect between local officials whose actions violate fair housing laws (often legislative or zoning bodies) and the local bureaucrats that administer HUD grants.

88. The Housing and Community Development Act of 1974 authorized the use of Community Development Block Grant (CDBG) funds for public services and for planning and program administration costs. Pub. L. 93-383, 88 Stat. 633, 641-42 (codified as amended in 42 U.S.C.); Consolidated Submission for Community Planning and Development Programs, 60 Fed. Reg. 1878, 1919 (Jan. 5, 1995); 24 C.F.R. § 570.601(a)(2) (2015) (AFFH as applied to CDBG); 24 C.F.R. § 91.225(a)(1) (2015) (local jurisdiction AFFH certifications for Consolidated Plans regarding housing activities under CDBG, HOME, ESG, and HOPWA funds).

89. Exec. Order No. 12892, 59 Fed. Reg. 2939, 2940-41 (Jan. 20, 1994).

90. *Id.*

91. 60 Fed. Reg. 1878, 1919 (Jan. 5, 1995); 24 C.F.R. § 91.225(a)(1) (1995).

obligations.⁹² Notably, HUD did *not* require grantees to submit their AIs to the agency—an omission that rendered the process toothless.⁹³

2. Watershed Litigation

With the dawn of AIs, advocates achieved new success in the courtroom, particularly using the False Claims Act and administrative complaints. While they achieved landmark settlements and favorable case law, the shortcomings of these litigation vehicles soon emerged.

Two cases are emblematic of the watershed litigation. First, in *United States ex rel. Anti-Discrimination Center v. Westchester County* (2006), the Anti-Discrimination Center (ADC) alleged Westchester County, NY had received \$52 million in federal funds under false pretenses in violation of the False Claims Act (FCA).⁹⁴ Specifically, it asserted Westchester (1) failed to conduct an analysis of fair housing impediments that considered race, (2) failed to identify and take steps to overcome impediments, and (3) failed to meet its obligation to maintain records.⁹⁵

The district court granted partial summary judgment in favor of the plaintiff, holding that Westchester had falsely certified seven annual AFFH certifications and more than one thousand implied certifications of

92. 24 C.F.R. §§ 91.225(a)(1); 91.325(a)(1); 570.487(b), 570.601(a)(2) (2015); *see also* 24 C.F.R. § 903.7(o) (2015) (requiring Public Housing Authorities to incorporate AFFH obligations in their PHA Administrative Plans).

93. The following year, HUD issued a Fair Housing Planning Guide to assist jurisdictions with completing AIs. U.S. DEP'T OF HOUS. & URBAN DEV., FAIR HOUSING PLANNING GUIDE 1-3 (1996), <https://www.hud.gov/sites/documents/FHPG.pdf> [<https://perma.cc/KU6U-UJDM>]. The Guide restated AFFH's broad application: "Although the grantee's AFFH obligation arises in connection with the receipt of federal funding, its AFFH obligation is not restricted to the design and operation of HUD-funded programs at the state or local level. The AFFH obligation extends to all housing and housing-related activities in the grantee's jurisdictional area whether publicly or privately funded." *Id.* at 1-3. The Guide also offered some guidance on how to analyze and eliminate the presence of housing discrimination in the jurisdiction and provide more inclusive housing options for historically disfavored groups. *Id.* at 2-16 to 2-30. Nevertheless, it still did not require grantees to submit any documentation to HUD for review.

94. *U.S. ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cty., N.Y.*, 668 F. Supp. 2d 548, 559 (S.D.N.Y. 2009) (citing to complaint).

95. *U.S. ex rel. Anti-Discrimination Ctr. v. Westchester Cty.* (S.D.N.Y. 2009), (1:06-cv-2860), ECF No. 11, at 14–15; 668 F. Supp. 2d at 548–59, 561–62.

compliance regarding HUD funds.⁹⁶ Notably, the court stressed that the AFFH certification process was not a mere formality but a substantive obligation that required Westchester to conduct an analysis of fair housing that considered race (as opposed to simply poverty), take appropriate actions in response to its analysis, and document its analysis and actions.⁹⁷ Shortly thereafter, the parties entered a \$62.5 million settlement agreement.⁹⁸

Meanwhile, plaintiffs pushed for more vigorous HUD enforcement. Using the administrative complaint process, individuals and organizations challenged how state and local jurisdictions distributed CDBG funds.⁹⁹ For illustration, in *Texas Low Income Housing Information Service et al. v. Texas et al.* (2009), private fair housing groups challenged Texas's distribution plan for nearly \$1.7 billion of Hurricane Katrina-related grants.¹⁰⁰ They

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96. 668 F. Supp. 2d at 550–51 (S.D.N.Y. 2009). As a *qui tam* action under the False Claims Act, the federal government had the opportunity to intervene. The U.S. Department of Justice initially declined to intervene and the complaint was unsealed and served in January 2007. Later, under the Obama Administration, the Department of Justice reconsidered and intervened for purposes of assisting the parties in negotiating a settlement. *Case Profiles: Anti-Discrimination Center v. Westchester County*, RELMAN DANE & COLFAX, <https://www.relmanlaw.com/cases-westchester> [<https://perma.cc/634P-5LGD>].
 97. 668 F. Supp. 2d at 569 (“The AFFH certification was not a mere boilerplate formality, but rather was a substantive requirement, rooted in the history and purpose of the fair housing laws and regulations, requiring the County to conduct an AI, take appropriate actions in response, and to document its analysis and actions.”).
 98. See Stipulation and Order of Settlement and Dismissal at 4–6, *U.S. ex. rel. Anti-Discrimination Ctr. v. Westchester Cty.*, No. 1:06-cv-2860 (S.D.N.Y. 2009), ECF No. 320; *Case Profiles*, *supra* note 98; see also Nikole Hannah-Jones, *Westchester County Could Lose Millions for Fair Housing Failures*, PROPUBLICA (Mar. 28, 2013), <https://www.propublica.org/article/westchester-county-could-lose-millions-for-fair-housing-failures> [<https://perma.cc/Z2WB-USHU>].
 99. Schwemm, *supra* note 55, at 166 (“With respect to administrative complaints, fourteen privately initiated § 3608-based claims were pending as of April 2011.”).
 100. See Conciliation Agreement, *Tex. Low Income Hous. Info. Serv. et al. v. Texas et al.*, HUD No. 06-10-0410-8 (May 25, 2010), https://www.hud.gov/sites/documents/DOC_4305.PDF [<https://perma.cc/PVH9-793K>]; see also Press Release, HUD Applauds Revised \$1.7 Billion Texas Disaster Plan (May 25,

alleged, among other things, that Texas had failed to analyze the fair housing impact of its allocation plan, particularly to certain localities with a history of integration resistance, and asserted the plan would affirmatively perpetuate segregation, not integration.¹⁰¹ The case resulted in a significant settlement, requiring Texas to shore up its AFFH obligations, including updating its AI, document how municipalities (receiving funds from Texas as subgrantees) were satisfying their AFFH obligations, and spend over \$252 million on affordable and subsidized housing in targeted communities.¹⁰²

This growing body of litigation produced two noteworthy results. First, plaintiffs obtained substantial settlements against local governments, arguably the first semblance of teeth behind the mandate since Romney's efforts. Second, it spurred HUD to step up enforcement. In 2010, HUD internally reviewed more than 300 AIs for compliance.¹⁰³ While that reflects a fraction of all grantees, it was more than HUD had ever done to review AIs.¹⁰⁴ Nevertheless, success has been tempered by the limitations of the FCA and administrative complaints as broader AFFH enforcement vehicles.¹⁰⁵

2010), <https://archives.hud.gov/news/2010/pr10-106.cfm> [<https://perma.cc/42EY-LPJW>] (describing the conciliation agreement, as approved by HUD).

101. *See id.*; *see also* Schwemm, *supra* note 55, at 167 nn.254–55 (describing the settlement and related fair housing settlements).
102. *See* Conciliation Agreement, *supra* note 100; *see also* Schwemm, *supra* note 55, at 167 nn.254–55.
103. U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-905, HOUSING AND COMMUNITY GRANTS: HUD NEEDS TO ENHANCE ITS REQUIREMENTS AND OVERSIGHT OF JURISDICTIONS' FAIR HOUSING PLANS 46–47 (Sept. 2010) [hereinafter GAO Report], <https://www.gao.gov/assets/320/311065.pdf> [<https://perma.cc/RB5L-RLLT>].
104. *See id.* at 45–47 (appended letter from HUD Assistant Secretary discussing the breadth of HUD's review efforts).
105. In the case of the False Claims Act, if other courts agree with the district court in *Westchester*, FCA claims will only survive a motion to dismiss where the plaintiff can plausibly allege that the jurisdiction falsely certified that it undertook an analysis of race (as opposed to only poverty). This holding appears to be limited to failing to conduct any analysis of race—which *Westchester* did not because it substituted income for race—and does not speak to a merely substandard analysis. In other words, substantial compliance with the minimal AI framework may defeat an FCA challenge.

3. Renewed Scrutiny

It quickly became clear that the AI process was ineffective. Between 2008 and 2010, three prominent investigations drove the point home: While AIs were a modest improvement over so-called “certification”—the process from 1974 to 1995—the new schema still lacked meaningful federal accountability. This point was illustrated by the fact that grantees were not even required to submit their AIs to HUD for review. Even when HUD later investigated a record number of AIs (one-fourth of all grantees), it didn’t hold anyone’s “feet to the fire” for submitting insufficient AIs.¹⁰⁶

In 2008, the Fair Housing Act’s fortieth anniversary, civil rights leaders convened the National Commission on Fair Housing and Equal Opportunity to study fair housing’s future.¹⁰⁷ Two former HUD secretaries co-chaired the

Presumably, after *Westchester*, most jurisdictions easily avoid FCA liability by conducting at least a nominal analysis of fair housing by race. For a broader discussion of the limits of the FCA, see Stephen F. Hayes, *Enforcing Civil Rights Obligations Through the False Claims Act*, 1 COLUM. J. RACE & L. 29 (2011).

Perhaps the foremost barrier to effective FCA litigation is the public disclosure bar. See 31 U.S.C. § 3730(E)(4)(A) (precluding suit when there has been a public disclosure of the allegations or transactions at issue, unless the relator is an “original source of the information”); U.S. *ex rel.* Lockey v. City of Dallas, 576 F. App’x 431, 434–38 (5th Cir. 2014) (per curiam).

Finally, it bears noting that FCA claims are not the only potential avenue for private action. Two other options may be available, but neither is promising. First is an APA challenge, which is subject to the strict limits discussed above. See *supra* note 59. Second is a Section 1983 action. While courts have not universally excluded this option, case law strongly suggests courts disfavor the approach. Schwemm, *supra* note 55, at 144 n.115 (citing cases).

Administrative complaints have their own limitations, including that they depend on HUD action, proceed slowly, and are limited in scope and precedential value.

106. See Peter Applebome, *Integration Faces a New Test in the Suburbs*, N.Y. TIMES (Aug. 22, 2009) <https://www.nytimes.com/2009/08/23/weekinreview/23applebome.html> [<https://perma.cc/R7V5-9TBF>] (quoting HUD Deputy Secretary Ron Sims regarding the *Westchester* settlement, “Until now, we’ve tended to lay dormant. This is historic because we are going to hold people’s feet to the fire.”).

107. *The Future of Fair Housing*, Nat’l Comm’n on Fair Housing & Equal Opportunity 2 [hereinafter National Commission Report] (Dec. 2008), https://www.nationalfairhousing.org/wp-content/uploads/2017/04/Future_of_Fair_Housing.pdf [<https://perma.cc/XK2T-L24H>].

Commission—Henry Cisneros (Clinton Administration) and Jack Kemp (G.W. Bush Administration).¹⁰⁸ The National Commission held hearings in five cities, taking extensive testimony.¹⁰⁹

The National Commission did not hold back in its final report. On the AFFH mandate, it candidly concluded:

[T]he government and its grantees have not taken this mandate seriously. In order to make this statutory obligation a reality, we must make changes in federal programs and activities to avoid further segregation and promote wider housing choices for families [D]espite the strong statutory underpinning for the [AFFH] obligation, the testimony unanimously reported that the process was not functioning as intended. HUD has not been successful in bringing the affirmatively furthering obligation to life.¹¹⁰

On HUD's fumbling:

HUD only requires that communities that receive federal funds "certify" to their funding agency that a jurisdiction is affirmatively furthering fair housing. HUD requires no evidence that anything is *actually being done as a condition of funding*, and it does not take adverse action if jurisdictions are directly involved in discriminatory actions or fail to affirmatively further fair housing.¹¹¹

The National Commission issued specific recommendations to HUD: (1) promulgate detailed AFFH requirements, such as benchmarks, performance standards, and sanctions for non-compliance; (2) provide grantees more training and technical assistance in the AI process; and (3) aggressively monitor AIs for compliance. Particularly noteworthy is its final recommendation: (4) make non-compliance "directly actionable through administrative complaints filed by individuals and organizations."¹¹²

108. *Id.* (Executive Summary).

109. *Id.* at 1.

110. *Id.* (Executive Summary).

111. *Id.* (emphasis added).

112. *Id.* at 44–46.

Soon, HUD conducted its own internal investigation.¹¹³ And a third entity followed suit—at the request of Congress, the U.S. Government Accountability Office launched an investigation.¹¹⁴ While the National Commission examined fair housing compliance more broadly, HUD and the GAO narrowed their focus to AFFH compliance.¹¹⁵

HUD examined whether AIs met even basic guidelines.¹¹⁶ HUD randomly reviewed a sample of seventy AIs from jurisdictions across the country.¹¹⁷ Among them, only forty-five turned AIs over to HUD.¹¹⁸ In other words, over one-third of grantees either did not have or could not locate an AI. Perhaps this shouldn't be surprising: While AIs had been required for over a decade, this was probably the first time HUD had ever asked those jurisdictions to prove they had actually conducted an analysis. It is highly likely some never did. In its final report, HUD issued the following internal recommendations: at a minimum, require grantees to submit their AIs to HUD to prove completion.¹¹⁹ Better yet, for transparency and accountability, HUD should review every submission for compliance and post AIs in a publicly available clearinghouse.¹²⁰

113. U.S. DEP'T OF HOUS. & URBAN DEV., POLICY DEV. DIVISION, OFF. OF POLICY DEV. & RESEARCH, ANALYSIS OF IMPEDIMENTS STUDY [hereinafter HUD STUDY] (2009), <https://assets.documentcloud.org/documents/365748/hud-reporting-compliance-report.pdf> [<https://perma.cc/6XEX-BXC4>]; see also GAO REPORT, *supra* note 103, at 2, 4, 22, 25 (citing the internal HUD study). Around the same time, advocacy groups released reports detailing similar AFFH enforcement deficiencies and parallel reform recommendations. See, e.g., The Opportunity Agenda, *Reforming HUD's Regulations to Affirmatively Further Fair Housing* (Mar. 2010), <https://www.opportunityagenda.org/sites/default/files/2017-03/2010.03ReformingHUDRegulations.pdf> [<https://perma.cc/HB8N-HJXF>].

114. GAO REPORT, *supra* note 103, at 36–37.

115. Compare NATIONAL COMMISSION REPORT, *supra* note 107, with GAO REPORT, *supra* note 103, and HUD STUDY, *supra* note 113.

116. GAO REPORT, *supra* note 103, at 2 n.5 (explaining the scope of the internal HUD STUDY, including timeliness of AI submissions and types of impediments to fair housing analyzed by local communities).

117. HUD STUDY, *supra* note 113, at 4.

118. *Id.*; GAO REPORT, *supra* note 103 at 12; see also *id.* at 14 & n.19 (observing that some jurisdictions may have been receiving funding without preparing an AI and observing HUD field office officials had identified at least one grantee that had received funds without preparing an AI).

119. HUD STUDY, *supra* note 113, at 16–18.

120. *Id.* at 17.

The GAO report was especially unflattering. Boldly titled “Housing and Community Grants: HUD Needs to Enhance Its Requirements and Oversight of Jurisdictions’ Fair Housing Plans,” the report reviewed AIs from a randomly selected sample of 466 of the 1,209 fiscal year grantees.¹²¹ It found fewer than two-thirds had current AIs—at least 29 percent were outdated.¹²²

Ultimately, the GAO found that AIs failed to serve their intended purpose—to help grantees identify and overcome specific impediments to fair housing.¹²³ It attributed at least part of the problem to HUD’s lack of enforcement.¹²⁴ The GAO recommended HUD enact uniform standards (*e.g.* format and timeframes) and that grantees be required to submit AIs to HUD for review.¹²⁵

121. GAO REPORT, *supra* note 103 (unnumbered title page), at 3.

122. *Id.* at 9–11. The GAO also observed that two HUD offices share responsibility for overseeing CDBG and HOME grantee compliance with AFFH requirements: The Office of Community Planning and Development and Office of Fair Housing and Equal Opportunity, which may complicate effective oversight. *Id.* at 8–9. Like HUD, the GAO also struggled to obtain AIs from many jurisdictions, which strongly suggested those jurisdictions never conducted them. *Id.* at 3–4, 9 (“[GAO] did not receive AIs from 25 grantees despite repeated requests that they provide them, which suggests that, in some cases, grantees may not maintain the documents as is required.”). Perhaps most importantly, the GAO report found that many AIs contained grossly inadequate analyses. For instance, some jurisdiction attempted to pass off the following documents as AIs: a two-page email noting a single impediment; in another case, a four-page survey of residents on fair housing, without analysis of the results; and in a third case, a three-page document describing activities to reduce homelessness that described “affordable housing” barriers without discussing race-related barriers. *Id.* at 14–15.

123. *Id.* at 2, 21, 31–32.

124. *Id.* at 22.

125. *Id.* at 32–33; *see also* Ed Gramlich, *Affirmatively Furthering Fair Housing (AFFH) Under the July 16, 2015 Final Rule: 2019 Advocates’ Guide*, NAT’L LOW INCOME HOUS. COAL. 7-27 to 7-28, https://nlihc.org/sites/default/files/AG-2019/Advocates-Guide_2019.pdf [<https://perma.cc/PNE8-Q9SW>] (“[The AI framework] was not effective There were numerous limitations of the pre-existing AFFH system, beginning with the absence of regulatory guidance Without guidance and because public participation was not required in the preparation of an AI, many wholly inadequate AIs were drafted. Although other AIs were quite extensive, they seemed destined to sit on a shelf in case HUD asked to see them (AIs were not submitted to HUD for

4. AFFH Rule (2015)

Galvanized by these findings, the Obama Administration breathed new life into the AFFH mandate.¹²⁶ Under new HUD leadership, it invested two years gathering public input from stakeholders¹²⁷ before promulgating a final rule in 2015.¹²⁸

The resulting AFFH Rule was a data-driven, process-oriented, teach-a-grantee-to-fish approach. The defining feature was the Assessment of Fair Housing (AFH), which replaced the AI.¹²⁹ Responding to repeated clamor, the AFH is a highly structured reporting framework, to be completed in conjunction with the later-promulgated template known as the “Assessment Tool.”¹³⁰ Compared to the AI, the AFH provided much clearer guidance and draws links to other planning tools required of most grantees, such as the Consolidated Plan.¹³¹ Finally and critically, the AFFH Rule required HUD to

review). In addition, AIs were not directly linked to a jurisdiction’s ConPlan or PHA’s Five-Year Plan. AIs also had no prescribed schedule for renewal; consequently, many were not updated in a timely fashion.”).

126. Bostic & Acolin, *supra* note 52, at 197 (noting the Obama Administration’s response to the 2010 GAO REPORT).

127. See Final Rule, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,272 (July 16, 2015) (describing HUD’s efforts to gather stakeholder input).

128. *Id.* Accompanying the final AFFH Rule were several notices, which contained the Assessment Tools customized to different types of jurisdictions. See *infra*, notes 139–144.

129. *Id.* at 42,273–75 (describing how the AFH replaces the AI).

130. *Id.* at 42,273–76. Following the final rule, HUD issued supplemental notices releasing the various Assessment Tools customized to various types of grantees (generally referred to as the “Assessment Tool”). See, e.g., Affirmatively Furthering Fair Housing Assessment Tool for Public Housing Agencies: Announcement of Final Approved Document, 82 Fed. Reg. 4373 (Jan. 13, 2017).

131. See, e.g., Gramlich, *supra* note 125, at 7-30 (“The Assessment Tool refers to forms or templates provided by HUD The Assessment Tool consists of a series of questions designed to help program participants identify racially and ethnically concentrated areas of poverty, patterns of integration and segregation, disparities in access to opportunity, and disproportionate housing needs There are separate assessment tools for local jurisdictions, states, and PHAs.”).

review and approve all AFHs through an iterative process. No longer would HUD rely on a grantee's word alone.¹³²

The Rule's preamble described five objectives: (1) replacing the AI process with a "more effective and standardized [assessment of fair housing] through which program participants identify and evaluate" fair housing issues and contributing factors, (2) improving fair housing assessment and planning by providing HUD data to program participants, who must consider them in their assessment, (3) explicitly incorporating fair housing planning into other community planning processes for the first time (such as the ConPlan and PHA Plan), (4) encouraging regional cooperation to address fair housing, and (5) providing a more meaningful public participation process.¹³³

The Rule did not mandate specific outcomes, but merely established parameters to guide grantee planning and investment.¹³⁴ In other words, it

132. Regulated entities include any jurisdiction receiving federal funds for any of the following programs: CDBG, HOME, public housing, and Section 8, among others. *See, e.g.*, Gramlich, *supra* note 125, at 7-14 to 7-27 (details the legal requirements in the authorizing legislation for these programs). Likewise, states must assure that local units of government receiving these funds (passed through the state) must comply with AFFH obligations. *See also* Fair Housing Planning Guide, U.S. DEP'T OF HOUS. & URBAN DEV. (1996), <https://www.hud.gov/sites/documents/FHPG.PDF> [<https://perma.cc/4Z8X-CZMM>] (describing the applicability and scope of AFFH obligations).

It warrants mention that HUD has an internal complaint process. It is possible that the public may make complaints about a jurisdiction's failure to comply with the AFFH, but there is little publicly available information about the complaint process. It appears HUD has complete discretion over the process and there is no public accountability over HUD's internal complaint process, and therefore no guarantee that a complaint results in an investigation or enforcement action.

133. 80 Fed. Reg. 42,272, 42,273 (July 16, 2015).

134. *See, e.g., id.* at 42,287 (responding to public comments that the final Rule mandate certain outcomes: "HUD agrees with the commenters that the AFH process, to be effective, should have benchmarks and outcomes, but HUD agrees with the later commenters that the final rule should not specify the benchmarks or mandate certain outcomes. The final rule provides for the establishment of benchmarks, but established by the program participant and not HUD. However, as a part of the AFH review process, HUD will include review of benchmarks and outcomes, as reflected in a program participant's goals."); *see also id.* at 42,313 (responding to public comments to the proposed rule that preceded the 2015 final Rule requesting more robust enforcement

went to great lengths to emphasize that every community is unique, and the AFH process would respect local insight into the causes and best remedies to local fair housing barriers.¹³⁵ But this is not to say that it did not have an

measures: “HUD understands the commenters’ concerns regarding the absence of an enforcement provision in this final rule with respect to the [AFFH mandate]. This final rule, however, is a planning rule, not a rule directed to the enforcement of the duty to affirmatively further fair housing. As a planning mechanism, this rule provides for a review by HUD of the AFH to determine compliance with the standards set forth in [promulgated regulations] and for acceptance, or nonacceptance and resubmission (in the case of nonacceptance) of an AFH if the AFH fails to meet these standards. While HUD declines to include a provision in this planning rule that would specifically set out the process for enforcing the [AFFH mandate], HUD notes that it already has the authority to enforce this statutory obligation and that HUD uses its existing [] regulations and processes to accept complaints and conduct compliance reviews.”). For a list of HUD’s primary enforcement tools, see U.S. COMM’N ON CIVIL RIGHTS, ARE RIGHTS A REALITY?: EVALUATING FEDERAL CIVIL RIGHTS ENFORCEMENT 227–29 (Nov. 21, 2019), <https://www.usccr.gov/pubs/2019/11-21-Are-Rights-a-Reality.pdf> [<https://perma.cc/393R-CCV8>] (compiling testimony on HUD’s limited workforce and civil rights enforcement capacity).

135. This deference to local insight is particularly noteworthy since the AFFH’s primary controversy is rooted in ideological disagreement over the role of the federal government in addressing housing segregation. This debate is expressed in concern over the AFFH’s reach into decision-making traditionally within local purview, such as local zoning, local expenditures, and city planning. The debate predates the original Act and remains central, as illustrated in the public comments in both the 2015 AFFH Rule and 2020 proposed rule. Compare, e.g., Michael Hendrix, Opinion, *Freer Housing is ‘Fairer Housing’—HUD Should Tie Funding to Looser Zoning*, THE HILL (Nov. 1, 2019), <https://thehill.com/opinion/civil-rights/468060-freer-housing-is-fairer-housing-hud-should-tie-funding-to-looser-zoning> [<https://perma.cc/MA4Z-NWU9>] (advocating an approach that incentivizes local decision-making but leaves local jurisdictions substantial discretion) (“To be clear, zoning reform should not be enacted at the federal level. State and local leaders are responsible for ensuring their land-use regulations do not stand in the way of markets offering a greater supply and variety of housing wherever there is a demand for it.”) with Debby Goldberg & Morgan Williams, Opinion, *Zoning Is Not the Answer to All Our Housing Problems*, THE HILL (Nov. 7, 2019), <https://thehill.com/opinion/civil-rights/469009-zoning-is-not-the-answer-to-all-our-housing-problems> [<https://perma.cc/WK9Y-GNDK>] (arguing in federalism terms that the existing AFFH Rule actually provides jurisdictions more flexibility and the 2020 proposed rule handcuffs

eye toward outcomes. The Rule required grantees to explain how they would use federal resources to overcome specific impediments and required them to report back on progress in subsequent submissions.¹³⁶

An AFH report was the grantee's final work product to HUD. It featured data analysis, assessment of the specific fair housing challenges facing the community, identification of fair housing priorities and goals, strategies and actions for implementing the goals, and review of progress achieved since the previous AFH.¹³⁷ It departed from the AI process in meaningful ways:

- (1) Definitions: It defined terms not defined in statute, including "affirmatively furthering fair housing";¹³⁸
- (2) Guidance: It described how to analyze fair housing impediments.¹³⁹

local jurisdictions with a one-size federal mandate) ("The existing HUD rule . . . is designed to serve just this purpose by providing jurisdictions with a process to review their markets, including zoning and land use restrictions, and identify nuanced local solutions Requiring local communities to employ a single, federally-mandated strategy to reduce zoning restrictions . . . robs local governments of the ability to devise multifaceted, locally-tailored solutions.").

- 136. *E.g.*, 24 C.F.R. § 5.154(d)(4) (2015) (identification of fair housing priorities and goals; § 5.154(d)(5) (2015) (implementation); and § 5.154(d)(7) (2015) (analysis of progress since prior AFH).
- 137. 80 Fed. Reg. 42,272, 42,355–56 (July 16, 2015).
- 138. *See, e.g., id.* at 42,253–54 (definitions). The Rule defines "affirmatively further fair housing" as "taking meaningful actions, in addition to combatting discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics." *Id.* It elaborates: "meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty . . . extends to all of a program participant's activities and programs relating to housing and urban development." 24 C.F.R. § 5.152 (2015) (emphasis added).
- 139. 80 Fed. Reg., *supra* note 137, at 42,355–57. This is a noteworthy change, as the previous guidance, the 1996 Planning Guide, did not have the authority of law.

(3) Data: HUD supplied relevant data for the specific locality and region, which the grantee had the option to supplement with additional local data;¹⁴⁰

(4) Oversight: It required submission to HUD;¹⁴¹

(5) Coordinated Planning: It defined the relationship between AFHs and other required planning documents;¹⁴² and

(6) Deadlines: It required submission at least every five years, staggered by jurisdiction.¹⁴³ Early analysis of the AFFH Rule revealed two encouraging observations: First, it attempted to shift compliance toward a routine, non-adversarial—even collaborative—process.¹⁴⁴ In other words, it attempted to normalize compliance and make it less threatening to local control. This is critical in light of recent AFFH history. Fearing liability in lawsuits like *Westchester*—yet lacking clear guidance—jurisdictions were reluctant to discuss their AFFH activities with the federal government under the deficient AI schema. A non-adversarial approach is more likely to garner accurate, forthright information and encouraging compliance over time. Second, the Rule was iterative by design. It involved a back-and-forth conversation between HUD and the jurisdiction at the at multiple stages, leaving room for reflection and revision. Thus, it sent a better message: resubmission was not failure, just one step in a multi-step process designed to better understand and overcome that jurisdiction's challenges.

140. *Id.* at 42,272–73.

141. *Id.* at 42,272, 42,313, 42,316, 42,355, 42,357–58 (July 16, 2015) (describing submission and resubmission); 24 C.F.R. § 5.160 (2015) (describing submission deadlines, frequency, and certification requirements).

142. *Id.* at 42,273.

143. *Id.* at 42,357–58 (describing staggered submission requirements).

144. *Id.* at 247.

While just a few dozen jurisdictions completed the new process, their feedback was promising.¹⁴⁵ The new Rule was the government's first meaningful attempt to exercise its AFFH mandate in nearly fifty years.¹⁴⁶

145. The City of Los Angeles's AFH experience is representative. It conducted a months-long AFH only to receive an unexpected letter from HUD on day 59 of the 60-day review period stating that its AFH would no longer be reviewed because HUD had extended the submission deadline by two years (later proposing to suspend AFH submission indefinitely). Nevertheless, the city described the AFH process as "thoughtful and engaging, and therefore, time well spent to develop a set of meaningful goals and strategies." See Los Angeles Housing and Community Investment Department, Comment Letter on Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants (Mar. 6, 2018), at 1, <https://www.regulations.gov/contentStreamer?documentId=HUD-2018-0001-0042&attachmentNumber=1&contentType=pdf> [<https://perma.cc/DCU5-5S2K>]. The City went on to say that it "fully support[ed] HUD's continued implementation of the 2015 AFFH rule and oppose[d] efforts to continue to delay its implementation. The decision to delay implementing the AFFH rule announced in the Notice was sudden." It therefore "respectfully request[ed] that HUD rescind its suspension notice and immediately resume implementation of the AFFH rule, while proceeding to improve the AFFH Data and Mapping Tool and the User Interface." *Id.* at 2.

The City's letter is one representative opinion among a variety of jurisdictions that urged HUD to continue the AFFH Rule and illustrates that HUD's reasons for rolling back the Rule—particularly that the AFH was an ineffective process—are disingenuous.

146. See Justin Steil & Nicholas Kelly, *The Fairest of Them All: Analyzing Affirmatively Furthering Fair Housing Compliance*, 29 HOUSING POL'Y DEBATE 85, 85–105 (2019); see also Third Declaration of Justin Steil, at 2–20, *Nat'l Fair Hous. All. v. Carson*, Civ. No. 1:18-cv-1076-BAH (D.D.C. June 26, 2018) (No. 37-1) (describing the measurable comparative benefits of AFHs in overcoming barriers to fair housing).

The Clinton Administration unsuccessfully attempted to promulgate a less comprehensive AFFH Rule. In 1998, HUD issued but later withdrew a proposed rule. The rule would have clarified the requirements for AFFH certifications, added standards for HUD to assess whether the certifications were accurate, clarified that the duty was an affirmative one (i.e., inaction would not suffice), and stated that the penalty for noncompliance would be the denial of HUD funding. See *Fair Housing Performance Standards for Acceptance of Consolidated Plan Certifications and Compliance with Community Development Block Grant Performance Review Criteria*, 63 Fed. Reg. 57,882 (proposed Oct. 28, 1998).

II. WHERE WE STAND: THE RULE'S VULNERABILITY

The new AFFH Rule was short-lived. In 2018, the Trump Administration pulled the rug out. HUD's heel-turn handily illustrates why the AFFH mandate should not be enforced by regulation alone. As long as its key features are defined by regulation—not statute—they remain virtually defenseless to ideological revision. This Section dissects recent developments as a case study for why Congress should amend the AFFH mandate in statute.

This Section also grounds the AFFH mandate in the current moment: We live in a racist ecosystem that is defined by stubbornly entrenched segregation. This segregation has far-reaching repercussions—ones that we should keep front of mind because they influence nearly all other forms of racial inequality being protested in the streets. To deconstruct segregation, we need a legal framework that normalizes local compliance, backed by federal resources and accountability.

A. *Regulatory Rollback*

In January 2018, HUD suspended the AFH submission deadline for grantees, effectively delaying the AFFH process by more than five years.¹⁴⁷ It even suspended the deadline for grantees already in the submission process.¹⁴⁸ Moreover, it refused to provide feedback, even when a jurisdiction explicitly requested it.¹⁴⁹ Delaying in this manner, HUD

147. Affirmatively Furthering Fair Housing: Extension of Deadline for Submission of Assessment of Faith Housing for Consolidated Plan Participant (“AFH Extension Notice”), 83 Fed. Reg. 683, 684 (Jan. 5, 2018) (suspending submission deadlines for most local governments “until their next submission deadline that falls after October 31, 2020”); see Gramlich, *supra* note 125, at 7-15 (calculating that three-fourths of the 1,200 local jurisdictions would be delayed until 2025).

148. See *id.*

149. See, e.g., Los Angeles, *supra* note 145 (“We were disappointed to receive a letter from HUD on Day 59 of HUD’s 60-day review period that stated that our AFH will no longer be reviewed and accepted due to the two-year AFH submission extension. Consequently, we received no feedback on our 450-page submission nor acceptance from HUD which we were looking forward to receiving. Such acceptance would have given us the additional assurance that the goals and strategies in our AFH, which are still to be prioritized in our Consolidated Plan, would put the City of Los Angeles on a path forward to

appeared to be buying time to come up with a new plan that satisfied the whims of its new leadership.¹⁵⁰

Fair housing advocates responded by suing HUD for violating the Administrative Procedure Act.¹⁵¹ Instead of defending its questionable

fulfill the City's proactive approach to promote fair housing under the new AFFH rule."); *see also* Analysis of Impediments to Fair Housing Choice/Assessment of Fair Housing, L.A. CTY. DEV. AUTH., www.lacda.org/programs/community-development-block-grant/plans-and-reports/assessment-of-fair-housing [<https://perma.cc/6W3D-LJEK>] (describing HUD's refusal to accept the City's AFH under the "background" tab).

150. At that point, the Trump Administration's APA track record was abysmal. *See, e.g.,* Fred Barbash et al., *Federal Courts Have Ruled Against Trump Administration Policies at Least 70 Times*, WASH. POST (Apr. 26, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-overruled> [<https://perma.cc/LCD4-H2AL>]; Fred Barbash et al., *The Real Reason President Trump is Constantly Losing in Court*, WASH. POST (March 19, 2019), https://www.washingtonpost.com/world/national-security/the-real-reason-president-trump-is-constantly-losing-in-court/2019/03/19/f5ffb056-33a8-11e9-af5b-b51b7ff322e9_story.html [<https://perma.cc/NYK9-AXT3>]; Joe Sexton, *Trump, All About Winning, Sees Losses in Court Pile Up*, PROPUBLICA (Apr. 2, 2019), <https://www.propublica.org/article/president-donald-trump-losses-fred-barbash-washington-post-q-and-a> [<https://perma.cc/94P5-J9HF>]. HUD's attempt to roll back the AFFH was foreseeable long before HUD took formal action. *See, e.g.,* Ben Carson, *Opinion Experimenting with Failed Socialism Again*, WASH. TIMES, July 23, 2015, <https://www.washingtontimes.com/news/2015/jul/23/ben-carson-obamas-housing-rules-try-to-accomplish> [<https://perma.cc/YU9P-EVZH>]; Henry Grabar, *Trump's Rumored Housing Secretary is Best Known for Keeping His County Segregated*, SLATE (Nov. 14, 2016), <https://slate.com/business/2016/11/donald-trump-could-undo-obamas-big-hud-initiative-in-desegregation.html> [<https://perma.cc/YA6J-QNKU>]; Capps, *supra* note 31 ("This is not the first time that fair housing has come under the president's crosshairs, however. Trump pledged as a candidate in June 2016 to dismantle the AFFH rule in an appearance with former Westchester County Executive Rob Astorino, who is best known for his efforts in the decades-long battle to keep Black families out of white neighborhoods in suburban Yonkers. Carson, too, subscribes to the view that federal efforts to reduce segregation amount to 'social engineering.'").
151. Complaint, ECF No. 1, Nat'l Fair Hous. All. et al. v. Carson, Civ. 1:18-cv-1076 (DDC) (May 8, 2018). HUD took the position that withdrawing the Assessment Tool did not "suspend" the AFFH Rule. Plaintiffs argued that withdrawing

maneuver, HUD pivoted. It rescinded its January 2018 notice and withdrew the all-important Assessment Tool, the wind to the Rule's sail.¹⁵² One expert summarized the effect of withdrawing the Assessment Tool as reverting to the defective AI process:

The legal obligation to affirmatively further fair housing continues for all. However, until a local government is required to submit an AFH according to the suspension date, their AFFH obligation reverts to the previous, grossly inadequate protocol of certifying that they are affirmatively furthering fair housing¹⁵³

HUD's justification for withdrawing the Assessment Tool was ideological and arguably disingenuous.¹⁵⁴ It took the position that the new Rule—still in its infancy—was burdensome and flawed. Primarily, it blamed the rejection rate. It claimed that because HUD returned one-third (17 of 49) of *first-time* submissions for revision that the Rule “was not working as

the Assessment Tool was the functional equivalent of suspension. *See, e.g.*, Mem. Op., ECF. No. 55, Civ. 1:18-cv-1076, at 9 (Aug. 26, 2019).

152. Collectively referred to as the “Assessment Tool,” HUD designed three separate assessment templates tailored to the relevant entity (local governments, state governments, and public housing authorities). *See, e.g., supra* note 131. In withdrawing the Assessment Tool, HUD issued three notices: (1) Affirmatively Furthering Fair Housing: Withdrawal of Notice Extending the Deadline for Submission of Assessment of Fair Housing for Consolidated Plan Participants, 83 Fed. Reg. 23,928 (May 23, 2018); (2) Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922 (May 23, 2018); and (3) Affirmatively Furthering Fair Housing (AFFH): Responsibility to Conduct Analysis of Impediments, 83 Fed. Reg. 23,927 (May 23, 2018). *See* Press Release, U.S. Dep’t of Hous. & Urban Dev., *HUD Announces It Will Publish Three Federal Register Notices* (May 18, 2018), <https://web.archive.org/web/20200604141627/https://www.hudexchange.info/nnew/hud-announces-it-will-publish-three-federal-register-notices> [<https://perma.cc/9JF7-DFTU>]; *see also* Gramlich, *supra* note 125, at 7-15 (“The third notice acknowledged that without the Assessment Tool there can be no AFH.”)
153. Gramlich, *supra* note 125, at 7-15.
154. *See, e.g.*, Jeff Andrews, *The Fair Housing Rule Ben Carson’s HUD Wants to Delay, Explained*, CURBED (Jan. 26, 2018); Gramlich, *supra* note 125, at 7-15 to 7-16 (discussing HUD’s proffered justifications for its “drastic” and “indefinite[]” rule suspension).

an effective device.”¹⁵⁵ Among the predicaments with its proffered explanation is that HUD purposefully designed the submission process as an iterative one—with requests for resubmission as an intentional design to move jurisdictions toward better analysis and, ultimately, better outcomes.¹⁵⁶ Likewise, in issuing the final AFFH Rule, HUD fully recognized its need to scale up its resources, and took the initial step of staggering submissions to spread the workload.¹⁵⁷ The more credible explanation for HUD’s withdrawal of the Assessment Tool is that new leadership simply disagreed with what it perceived as a race-conscious, top-down federal mandate. So, HUD simply rewrote it.¹⁵⁸

Ultimately, the APA lawsuit challenging HUD’s maneuver was unsuccessful.¹⁵⁹ Regardless, HUD’s move was a temporary placeholder.

155. Affirmatively Furthering Fair Housing: Withdrawal of the Assessment Tool for Local Governments, 83 Fed. Reg. 23,922, 23,923 (May 23, 2018).

156. In its notice of a final rule, HUD acknowledged its anticipated challenges with respect to scaling staffing and other resources to provide adequate technical assistance and AFH review. See Final Rule, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,350 (July 16, 2015) (“HUD itself will need to hire staff to implement the rule; provide data support; and review submitted AFHs”).

157. *Id.*; see also *id.* at 42,314 (“HUD believes that a staggered submission deadline, as recommended by many commenters, would be helpful not only to HUD but to program participants. . .”).

158. As discussed *infra* II.A, the proposed rule issued in January 2020 strongly reinforces this view, as does a critical mass of public comments from ideologically aligned think-tanks and industries with vested financial interests, *infra* note 161.

159. In *National Fair Housing Alliance et al. v. Carson*, the plaintiffs alleged three causes of action for violation of the Administrative Procedures Act and sought a preliminary injunction to reinstate the 2015 Rule. Complaint, ECF No. 1, Civ. 1:18-cv-1076 (DDC) (May 8, 2018). When HUD rescinded its original suspension notice and withdrew the Assessment Tool, the plaintiffs amended their complaint. Second Amended Complaint, ECF No. 48 (Sept. 14, 2018). HUD filed a motion to dismiss for lack of standing. A “close case,” the district court dismissed the action for lack of organizational standing. Memorandum Opinion, ECF No. 47, at 37 (Aug. 17, 2018). In the alternative, the court addressed the merits to the extent necessary to resolve the preliminary injunction request (e.g., determining the plaintiffs had not established a substantial likelihood of success on the merits). *Id.* at 55–73. The plaintiffs filed a motion to amend the judgment and motion for leave to amend the complaint. Motion to Alter Judgment, ECF No. 48 (Sept. 14, 2018). The

HUD also proceeded with the more formal notice-and-comment rulemaking process to revise the AFFH Rule. In August 2018, it issued an Advance Notice of Proposed Rulemaking, largely on the basis that the Rule was too onerous.¹⁶⁰ The public submitted 1,586 comments, the vast majority of which supported the existing AFFH Rule.¹⁶¹ Nearly five times as many comments supported the Obama-era Rule (71%) as opposed it (15%).¹⁶² Notably, several grantees with first-hand experience completing an Assessment of Fair Housing were highly supportive.¹⁶³

In January 2020, HUD issued a Notice of Proposed Rulemaking revising the AFFH Rule.¹⁶⁴ The proposed rule embodied some of the most pessimistic

proposed second amended complaint strengthened the plaintiffs' factual allegations regarding how HUD's withdrawal of the Assessment Tool harmed plaintiffs for organizational standing purposes. *Id.* On the merits, it asserted that, functionally, the withdrawal suspended the AFH process, and therefore the AFFH Rule itself. *Id.* A year later, the district court denied the motion, closing the case. Memorandum Opinion, ECF No. 55 (Aug. 26, 2019). The plaintiffs did not appeal.

160. Affirmatively Furthering Fair Housing: Streamlining and Enhancements, 83 Fed. Reg. 40,713–15 (Aug. 16, 2018).
161. Public comments are available on the federal government's rulemaking "eGovernment" portal. Affirmatively Furthering Fair Housing: Streamlining and Enhancements, Docket ID: HUD-2018-0060, FR-6123-A-01, <https://www.regulations.gov/docket?D=HUD-2018-0060> [<https://perma.cc/2KSM-V93L>]; see Georgetown Univ. Law Ctr. Civil Rights Clinic Comment Letter to FR-6123-A-01 Affirmatively Furthering Fair Housing: Streamlining and Enhancements, October 15, 2018, <https://www.regulations.gov/document?D=HUD-2018-0060-0659> [<https://perma.cc/2FVD-P48R>].
162. See *id.* The remaining comments were largely neutral or suggested minor tweaks. *Id.* One-fifth of comments in opposition to the existing AFFH Rule were submitted by public housing authorities (PHAs), which tend to oppose what they perceive as new, burdensome obligations in the AFFH Rule. See *id.*
163. *Id.*; see Los Angeles, *supra* note 145; N.Y.C. Dep't of Hous. Preservation & Dev., Comment Letter on Affirmatively Furthering Fair Housing: Extension of Deadline for Consolidated Plan Participants (Mar. 6, 2018), <https://www.regulations.gov/contentStreamer?documentId=HUD-2018-0039-0011&attachmentNumber=1&contentType=pdf> [<https://perma.cc/9YV8-2QNM>].
164. Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020). Opponents of the AFFH Rule have introduced legislation in Congress to prohibit the federal government from using its funds to administer,

predictions: It scrapped the AFH process altogether,¹⁶⁵ replaced the so-called “top-down” directive with a “certification,” (essentially reverting to the defective AI process of the 1990s),¹⁶⁶ and, third, virtually eliminated the

implement, or enforce the AFFH Rule, and even prohibit it from maintaining a federal database with information on community racial disparities or disparities in access to housing. Ultimately, when the Senate considered the FY2017 Transportation and HUD funding bill, a similar amendment was proposed but tabled. Instead, the negotiated result was an amendment that would prevent HUD from using federal funds “to direct a grantee to undertake specific changes to existing zoning laws as part of carrying out the final rule entitled ‘Affirmatively Furthering Fair Housing.’” See Pub. L. No. 115-31, § 243 (General Provisions for the Department of Housing and Urban Development); P.L. 115-141, § 234 (HUD General Provisions); see also LIBBY PERL, CONG. RESEARCH SERV., R44557, *THE FAIR HOUSING ACT: HUD OVERSIGHT, PROGRAMS & ACTIVITIES* 22–23 (2018) (describing amendments proposed to prevent implementation of the AFFH rule); Zack Hoopes, *Hampden Township Reverses Position in HUD Funding Controversy*, SENTINEL (June 17, 2019), https://cumberlink.com/news/local/govt-and-politics/hampden-township-reverses-position-in-hud-funding-controversy/article_c2d1d1b9-d009-547d-b524-8daaf50aa81c.html [<https://perma.cc/XH4H-F2U5>] (describing how one Pennsylvania township reversed its previous position of rejecting community development grants from HUD after the budget language was passed, having initially feared federal overreach into local zoning laws); Robert Romano, *President Trump is Ending the Obama-Biden Regulation to Rezone Neighborhoods Along Income and Racial Guidelines*, DAILY TORCH, July 20, 2020, <http://dailytorch.com/2020/07/president-trump-is-ending-the-obama-biden-regulation-to-rezone-neighborhoods-along-income-and-racial-guidelines> [<https://perma.cc/DB8T-7M96>] (detailing the legislative response to the AFFH Rule from 2016 to present, with links to roll call votes). As a practical matter, the budget language has no legal effect, is a matter of political optics, as the federal government lacks authority to override a local jurisdiction’s zoning regulations. See *id.* (describing how county officials question the wisdom of jurisdictions that refuse all grant funding to avoid federal scrutiny, especially because “HUD has never superseded local zoning laws ... on its own accord.”). But, as a matter of political optics, the administration prevailed.

165. Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041, 2053–54 (Jan. 14, 2020) (eliminating 24 C.F.R. §§ 5.151–.154). The rule also removes any additional AFFH-specific public participation requirements, folding all planning into the Consolidated Planning process.
166. *Id.* at 2044, 2053 (redefining the AFFH obligation in § 5.150 to provide that “HUD may consider a failure to meet the duty to affirmatively further fair housing a violation of program requirements” and revising § 5.155 to create a

race-conscious elements, speciously supplanting them with market-based affordable housing “incentives” as if building more affordable housing would address segregation.¹⁶⁷

HUD offered five official justifications for rewriting the Rule: (1) high “failure rate” for jurisdictions during the first round of submissions, (2) resource burdens on HUD (technical assistance), (3) lack of sufficient tailoring by type of program participant, (4) too much focus on process over outcomes, and (5) process burdens on HUD (generating data and tools).¹⁶⁸

Despite sharp criticism,¹⁶⁹ HUD went further. Quoting the Federal Register verbatim: “[W]hen the President reviewed the proposed rule, he expressed concern that the HUD approach did not go far enough ... to

new incentive program for building affordable housing); *see also id.* at 2045 (discussing the new AFFH certification process requiring jurisdictions to identify three “goals” or “obstacles to fair housing choice it plans to address, within the scope of its influence, to increase fair housing choice.”).

167. *See, e.g., id.* at 2053–54 (removing reference to segregated living patterns in § 5.150); *id.* (revising § 5.155 to create a new incentive program for building affordable housing); *see also id.* at 2053 (redefining “fair housing choice” to focus on access to affordable housing options “within [a person’s] means.”).

168. *Id.* at 2042–43.

169. *See, e.g.,* Curtis Bunn, *HUD’s Fair Housing Policies Could Promote Further Racial Discrimination, Experts Say*, NBC NEWS (Jan. 22, 2020), <https://www.nbcnews.com/news/nbcblk/hud-s-fair-housing-policies-could-promote-further-racial-discrimination-n1118636> [<https://perma.cc/S57K-8DRN>] (“Carson’s proposal has enraged and galvanized fair housing advocates who insist it would ‘gut’ the AFFH mandate, which they see as a vital protection against discrimination.”); Lola Fadulu, *Trump Pulls Back Efforts to Enforce Housing Desegregation*, N.Y. TIMES (Jan. 3, 2020), <https://www.nytimes.com/2020/01/03/us/politics/trump-housing-segregation.html> [<https://perma.cc/7ZE8-GUJK>] (describing how the proposed rule would “drastically pare [legal definitions] back to simply saying people should live ‘where they choose, within their means, without unlawful discrimination’ No mention of segregation appears in the new definition.”); Solomon Greene & Shamus Roller, *When a Fair Housing Rule is Not Fair*, THE HILL (Jan. 7, 2020), <https://thehill.com/blogs/congress-blog/politics/477227-when-a-fair-housing-rule-is-not-fair> [<https://perma.cc/2MWH-CMHE>] (criticizing the proposed rule for failing “to mention racial segregation or racially concentrated poverty—the twin evils the Fair Housing Act was designed to address.”); Wang, *supra* note 31 (documenting concerns that the “proposal reverts the functions of the AFFH mandate back to a time when no plans were required by HUD and jurisdictions were confused on how they should comply”).

reduce federal control of local housing decisions.... The President therefore asked HUD to reconsider the rule to see whether HUD could do more....”¹⁷⁰

To pacify the president’s dissatisfaction—eerily similar to Nixon’s displeasure fifty years earlier—HUD skipped the notice-and-comment process altogether and issued a new rule, “Preserving Community and Neighborhood Choice.”¹⁷¹ The Replacement Rule repeals not only the Obama-era AFFH Rule but scraps the Clinton-era Analysis of Impediments (AI), reverting to essentially nothing.¹⁷² It downgrades the governing standard to a rational basis test: A grantee must simply make a “general commitment that [it] will use the funds to take active steps to promote fair housing.... AFFH certifications will be deemed sufficient provided [the grantee] took any action during the relevant period rationally related to promoting fair housing, such as helping eliminate housing discrimination.”¹⁷³

And thus, in a few short sentences, HUD collapsed the Fair Housing Act’s two distinct mandates—anti-discrimination and affirmative integration—into one, essentially writing the AFFH mandate into oblivion.

While the Replacement Rule acknowledges “the judicial consensus that AFFH requires more than simply not discriminating,”¹⁷⁴ the new standard does not reflect that interpretation. Rather, the rational basis standard as

170. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,901 (Aug. 7, 2020) (the “Replacement Rule”); *see also* Affirmatively Furthering Fair Housing, 85 Fed. Reg. 2041 (Jan. 14, 2020) (proposed final rule).

171. Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,901 (Aug. 7, 2020). HUD claimed authority to bypass the notice-and-comment process by citing a grants-related APA provision exempting “matter[s] relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” *Id.* at 47,904 (citing 5 U.S.C. § 553(a)(2)) (“Because this rule applies only to the AFFH obligations of grantees, it is exempt under the APA.”). This questionable claim appears ripe for legal challenge.

172. HUD claimed authority to bypass the notice-and-comment process by citing a grants-related APA provision exempting “matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.” *Id.* at 47,904 (citing 5 U.S.C. § 553(a)(2)) (“Because this rule applies only to the AFFH obligations of grantees, it is exempt under the APA.”). This claim seems ripe for legal challenge.

173. *Id.* at 47,904.

174. *Id.* at 47,902.

articulated in the Replacement Rule has the effect of rubberstamping nearly any local decision, allowing local jurisdictions to carry on as usual.

It is important to not overlook the racially charged context and manner in which the Replacement Rule was announced. President Trump revealed the rollback in a series of Tweets in the summer of 2020 as racial protests raged in the streets.¹⁷⁵ He directed the Tweets to suburban residents—a key voting bloc that delivered him the White House in 2016 but then flipped to give Democrats control of the U.S. House of Representatives two years later.¹⁷⁶ Next, Trump co-authored a Wall Street Journal op-ed with HUD Secretary Ben Carson, which read as a long-form version of the Tweets, claiming the AFFH was a “radical social engineering project that would have transformed the suburbs from the top down” and drawing on fear-based themes that presidential candidate Joe Biden’s America was a “dystopian vision of building low-income housing units next to your suburban house.”¹⁷⁷ Another GOP politician went so far as to describe Biden’s vision for the future as “a horror film really. They’ll disarm you, empty the prisons, lock you in your home and invite MS-13 to live next door.”¹⁷⁸ This series of

175. *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 12:19 PM), <https://twitter.com/realDonaldTrump/status/1288509568578777088> [<https://perma.cc/QH9Z-53B9>] (“I am happy to inform all the people living their Suburban Lifestyle Dream that you will no longer be bothered or financially hurt by having low income housing built in your neighborhood. . . .”); Donald J. Trump (@realDonaldTrump), TWITTER (July 29, 2020, 12:19 PM), <https://twitter.com/realDonaldTrump/status/1288509572223651840> [<https://perma.cc/XUH4-JWHD>] (“Your housing prices will go up based on the market and crime will go down. I have rescinded the Obama-Biden AFFH Rule! Enjoy!”); Sylvan Lane, *Trump Claims Decision to Repeal Fair Housing Rule Will Boost Home Prices, Lower Crime*, THE HILL (July 29, 2020), <https://thehill.com/policy/finance/509595-trump-claims-decision-to-repeal-fair-housing-rule-will-boost-home-prices-lower> [<https://perma.cc/VAE5-J354>].

176. *See, e.g.*, Sean McMinn, *Where the Suburbs Moved Left—and How the Shift Swung Elections*, NAT’L PUB. RADIO (Nov. 27, 2018), <https://www.npr.org/2018/11/27/668726284/where-the-suburbs-moved-left-and-how-it-swinged-elections> [<https://perma.cc/2XHM-NXJ6>].

177. Donald J. Trump & Ben Carson, Opinion, *We’ll Protect America’s Suburbs*, WALL ST. J. (Aug. 17, 2020), <https://www.wsj.com/articles/well-protect-americas-suburbs-11597608133> [<https://perma.cc/MB96-AQPU>].

178. Thomas B. Edsall, Opinion, *I Fear That We Are Witnessing the End of American Democracy*, NY TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/opinion/trump-republican-convention-racism.html>

messages, designed to scare suburban voters, has irrefutable racial underpinnings, ones consistent with a Replacement Rule that eliminates any race-conscious attempt to reduce segregation.

Ultimately, the Trump Administration's rollback of the AFFH Rule underscores the ease with which any administration can undo any AFFH regulations. Thus, while the AFFH mandate has "strong statutory underpinning,"¹⁷⁹ its contours will remain in flux until codified in statute.¹⁸⁰

B. Entrenched Segregation

Today's deeply entrenched segregation—and its far-reaching repercussions—reinforce the urgent need for a clear, enforceable AFFH mandate. In this moment in our collective history we should revisit how neighborhood segregation influences nearly all other forms of racial inequality being protested in the streets.

There can be no doubt that segregation persists despite the enactment of fair housing laws. At least twenty-one metropolitan areas remain hyper-segregated.¹⁸¹ By one estimate, approximately ninety percent of all Black metropolitan residents live in "high" or "very high" segregation while only

[<https://perma.cc/8D8Y-W6AS>] (quoting GOP Congressman Matt Gaetz of Florida). The term "MS-13" refers to "one of the world's largest and arguably most violent street gangs" comprised of Latino men. *See, e.g.,* Héctor Silva & Insight Crime & Ctr. for Latin Am. & Latino Studies, *MS13 in the Americas*, <https://www.insightcrime.org/wp-content/uploads/2018/02/MS13-in-the-Americas-InSight-Crime-English-3.pdf> [<https://perma.cc/QDT9-AYHS>].

179. NATIONAL COMMISSION REPORT, *supra* note 107, at 9.

180. The incoming Biden Administration is likely to reinstate the Obama-era AFFH Rule, or a modified version of it. *See supra* note 35 (discussing Biden's commitment to what his campaign called the "Obama-Biden Administration's Affirmatively Furthering Fair Housing Rule"). For more information on how the Biden Administration should reinstate or modify the rule, see Megan Haberle, Peter Kye & Brian Knudsen, *Reviving and Improving HUD's Affirmatively Furthering Fair Housing Regulation: A Practice-Based Roadmap*, POVERTY & RACE RESEARCH ACTION COUNCIL (Dec. 2020), <https://prrac.org/pdf/improving-affh-roadmap.pdf> [<https://perma.cc/M49M-H7M9>].

181. Massey, *supra* note 1, at 579–80. For a discussion of what constitutes "hyper-segregation," see Misra, *supra* note 20 (defining a "hyper-segregated" city as meeting four of five segregation-related criteria).

ten percent live in “moderate” segregation and almost none live in “low” segregation.¹⁸²

After passage of the federal Act, segregation briefly decreased and then plateaued. For most cities, segregation peaked in the 1970s and declined modestly into the 1980s and onward.¹⁸³ In 2010, the five most segregated cities were Milwaukee, Gary, Detroit, Newark, and New York.¹⁸⁴ In those areas, researchers observed little decline in racial segregation since the late 1960s.¹⁸⁵ Thus, while segregation may have declined in some regions, it has displayed “remarkable persistence” in others.¹⁸⁶ Moreover, segregation of Hispanic from non-Hispanic white residents has increased, rather than decreased, in the two largest Hispanic communities, in New York and Los Angeles.¹⁸⁷

The repercussions of neighborhood segregation cannot be overstated. Where we live influences where we go to school; where we worship; where we work; where we socialize, and therefore whom we befriend; whom we work with; whom we form a family with; and ultimately the ideas, impressions, and frame of reference that form our worldview.

One author on American social institutions described the modern state of segregation this way:

182. SANDER ET AL., *supra* note 1 at 10.

183. Massey, *supra* note 1, at 578–79 & Fig.1 (citing John R. Logan & Brian J. Stults, *The Persistence of Segregation in the Metropolis: New Findings from the 2010 Census* (2011), <https://s4.ad.brown.edu/Projects/Diversity/Data/Report/report2.pdf> [<https://perma.cc/H9LH-8BAL>]; see also Massey & Rugh, *supra* note 19 (describing trends in residential segregation and spatial isolation).

184. Massey, *supra* note 1, at 579.

185. See *id.*

186. *Id.*; see generally Bruce Mitchell & Juan Franco, *HOLC “Redlining” Maps: The Persistent Structure of Segregation and Economic Inequality*, NATIONAL COMMUNITY REINVESTMENT COALITION (Mar. 20, 2018), <https://ncrc.org/holc> [<https://perma.cc/L5L3-WHLR>].

187. Massey, *supra* note 1, at 580 (“Whereas in 1970 the average Hispanic lived in a census tract that was just 27% Hispanic, by 2010 the figure stood at 47%.”). This Article uses the term “Hispanic” to remain consistent with the terminology used by the U.S. Census Bureau and HUD. The author acknowledges this is an imperfect term as many people prefer the terms “Latino,” “Latina,” or “Latinx,” and does not intend to exclude or otherwise diminish any person’s identity or experience by using the term “Hispanic.”

America's segregated modern life is marked by three realities: First, geographic segregation has meant that—although places like Ferguson and Baltimore may seem like extreme examples—most white Americans continue to live in locales that insulate them from the obstacles facing many majority-Black communities. Second, this legacy, compounded by self-segregation, has led to a stark result: the overwhelming majority of white Americans don't have a single close relationship with a person who isn't white. Third, there are virtually no American institutions positioned to resolve these problems. Social segregation persists in virtually all major American institutions.¹⁸⁸

Segregation also has far-reaching consequences for quality of life. For communities of color, segregation is correlated with lower income, lower quality education, shorter life expectancy, and higher homicide rate, among other outcomes.¹⁸⁹ Moreover, housing discrimination directed at residents in segregated communities of color is correlated with substantially lower homeownership rates.¹⁹⁰ This difference is critical, as homeownership is the primary driver of inter-generational accumulation of wealth, and the race homeownership gap is the primary driver of the country's racial wealth gap—not income inequality.¹⁹¹ Census Bureau data reveals that today's Black-white homeownership gap is actually greater than in 1968.¹⁹² In other words, segregation reinforces the mammoth racial wealth gap that constricts access to opportunity.

We live in a racist ecosystem, and segregation is its defining feature. Segregation's implications span nearly all aspects of American life. Its profound reach speaks to the urgency and need for a policy solution to shore up the AFFH's weaknesses.

188. ROBERT P. JONES, *THE END OF WHITE CHRISTIAN AMERICA* 155–56 (2016).

189. Acs et al., *supra* note 2, at 11–13 (income, education, life expectancy, homicide rate); *see also* R.A. Hahn et al., *supra* note 2, at 17–24 (social determinants of health).

190. Nigel Chiwaya & Janell Ross, *The American Dream While Black: Locked in a Vicious Cycle*, NBC NEWS (Aug. 3, 2020), <https://www.nbcnews.com/specials/american-dream-while-black-homeownership> [<https://perma.cc/CQY6-DTQX>].

191. *Id.*; *see also* ROTHSTEIN, *supra* note 2, at 180–83 (racial wealth gap).

192. Chiwaya & Ross, *supra* note 190.

III. WHERE TO NEXT: EFFECTIVE REFORM

Informed by the Fair Housing Act's most critical flaws, the path forward is clear. The Act itself must be amended to instill a durable AFFH compliance process. Amendment—necessary to remedy acute enforcement gaps—is long overdue. This Section describes and evaluates three critical substantive amendments aimed at making the Act a more effective anti-segregation tool. Moreover, it anticipates and responds to two likely critiques—the lack of political will and HUD's capacity to enforce a robust AFFH mandate. It concludes by exploring modest, incremental proposals to improve the status quo, which should be interpreted as alternative, not mutually exclusive, reforms.

A. *Statutory Amendment*

In 2015, it seemed HUD had finally found its stride. After years of planning, it promulgated a thoughtful regulation that balanced competing interests. The AFFH Rule standardized the compliance process with an eye toward fair housing outcomes.¹⁹³ It centered local decision-making while ensuring that localities would remain accountable to the federal government.¹⁹⁴

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193. See Assessment of Fair Housing, 24 C.F.R. § 5.154(d) (2017); Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,287 (July 16, 2015) (discussing outcomes and amending the final rule in response to comments recommending that HUD strengthen benchmarks to achieve better outcomes). See generally Justin Steil & Nicholas Kelly, *Snatching Defeat from the Jaws of Victory: HUD Suspends AFFH Rule that was Delivering Meaningful Civil Rights Progress*, POVERTY & RACE RESEARCH ACTION COUNCIL (Dec. 1, 2017), <https://prrac.org/snatching-defeat-from-the-jaws-of-victory-hud-suspends-affh-rule-that-was-delivering-meaningful-civil-rights-progress> [https://perma.cc/5KYL-N4TG] (discussing early research suggesting the Rule was achieving its objectives as compared to AIs, like evidence that grantees who had submitted AFHs had identified significantly more concrete commitments, innovative goals, and quantifiable metrics for fair housing success, as opposed to vague goals that “make[] essentially no public commitment to any defined action and provide[] minimal ways to measure if fair housing information is being effectively disseminated and what effect that dissemination is having on awareness or enforcement of fair housing laws”).
194. See, e.g., Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,288 (July 16, 2015) (“[R]ecognizing the importance of local decisionmaking, the new approach establishes basic parameters to help guide public sector

The Rule illustrates what can and must be done. Even so, any regulatory device is unacceptably vulnerable to changing political winds, and the now-repealed AFFH Rule was no exception.

This Section focuses on three statutory amendments. First, it details how Congress should incorporate the substantive provisions of the AFFH Rule into the Act's statutory text, particularly its definitions and accountability framework. Second, it recommends creating an express private right of action as another enforcement mechanism. Third, it highlights the value of housing mobility programs that, while not a wholesale solution, can meaningfully enhance access to opportunity in a society still beset by widespread segregation.

This Section also suggests a paradigm for appraising reforms: whether the proposal will enhance and normalize a compliance process that instills a culture of compliance at the local level. In this context, a "culture of compliance" means an expectation among local actors that they must regularly assess and report on the status of fair housing and their efforts to overcome those impediments. It involves an expectation that the requirements will be enforced and there will be consequences for non-compliance. It will be a new normal in which the jurisdiction's employees are properly trained to analyze fair housing impediments, use federal and local dollars to overcome those impediments, and track outcomes using targeted metrics and data collection. Ideally, it will be a new normal in which those employees understand the exceptional opportunity the process presents to enhance the quality of life and to reduce the negative costs of segregation in their communities.

housing and community development planning and investment decisions in being better informed about fair housing concerns and consequently help program participants be better positioned to fulfill their obligations to affirmatively further fair housing."); *id.* at 42,273 ("The rule covers program participants that are subject to a great diversity of local conditions and economic and social contexts The rule provides for program participants to supplement data provided by HUD with available local data and knowledge and requires them to undertake the analysis of this information to identify barriers to fair housing. Also, the rule affords program participants considerable choice and flexibility in formulating goals and priorities to achieve fair housing outcomes and establishing metrics that will be used to monitor and document progress. The precise outcomes . . . are uncertain, but the rule will enable each jurisdiction to plan meaningfully."); *id.* at 42,311 ("[I]t was also not HUD's intention to be overly prescriptive as to the standards by which HUD will evaluate and determine whether to accept an AFH.")

1. Filling the Statutory Void

Today, the AFFH mandate reads just as enacted in 1968. Section 3608(e)(5) provides that the Secretary of Housing and Urban Development shall “administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies of [fair housing].”¹⁹⁵ Extending the mandate across the government, section 3608(d) provides that “[a]ll executive departments and agencies shall administer their programs and activities relating to housing and urban development (including any Federal agency having regulatory or supervisory authority over financial institutions) in a manner affirmatively to further the purposes of this subchapter and shall cooperate with the [HUD] Secretary to further such purposes.”¹⁹⁶

While these phrases leave much to the imagination, the courts and executive branch have filled in certain details.¹⁹⁷ Even so, Congress must codify those details in statute for the aforementioned reasons. At a minimum, Congress should fill the statutory void in four ways: (1) insert an AFFH-specific purpose statement, (2) explicitly clarify the affirmative obligation the mandate places on all federal agencies and funding recipients, (3) define key terms like “affirmatively further fair housing,” and (4) codify an accountability framework that mimics the AFFH Rule’s balanced approach.

To reinforce the AFFH mandate’s role as a sibling to the anti-discrimination mandate—not distant cousin—Congress should amend the Act to include an AFFH-specific purpose statement. The integration mandate has been lost in the focus on anti-discrimination.¹⁹⁸ Indeed, for most of its history, the AFFH mandate has been an overlooked opportunity. An amendment should therefore feature a section on the reasons the government is required to affirmatively further fair housing, rooted in its legislative history. Most critically, it should acknowledge the well-documented history of the government’s role in engineering today’s racial segregation. It might read:

195. 42 U.S.C. § 3608(e)(5) (2015).

196. *Id.* § 3608(d) (2015).

197. *See supra* Part II.

198. *See, e.g.,* Bostic & Acolin, *supra* note 52 (describing the one-sided focus on the non-discrimination mandate to the detriment of the AFFH mandate). For a discussion of how civil rights have been deleteriously reduced to a narrow focus on non-discrimination at the expense of a broader justice-seeking jurisprudence, see generally WEST, *supra* note 24.

Housing segregation by race and ethnicity is a long-standing and costly problem that affects all people and communities in the United States. It is well documented that official government policies and practices have contributed to the prevalence and persistence of segregation. In light of that history, this Act acknowledges the responsibility of the government to take affirmative steps to deconstruct segregation. This section reaffirms the commitment of Congress announced in 1968: “It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.” 42 U.S.C. § 3601. Providing for fair housing requires the government to do more than refrain from discriminating. It must proactively dedicate federal resources to deconstruct barriers to fair housing to reverse the history of government-initiated and government-perpetuated segregation.¹⁹⁹

Such a purpose statement grounds the AFFH mandate in the government’s well-documented role in engineering the racial segregation of today. It squarely acknowledges the government’s culpability and reinforces the need for an affirmative duty.

Second, Congress should amend the Act’s text to make explicit that the AFFH mandate is an *affirmative* obligation, as courts have held since its infancy. For instance, courts have interpreted the mandate as a “national policy of nondiscrimination [that imposes] an obligation to do more than simply not discriminate”²⁰⁰ It requires that “[a]ction must be taken to fulfill, as much as possible, the goal of open integrated residential housing patterns and to prevent the increase of segregation, in ghettos, of racial groups whose lack of opportunities the Act was designed to combat.”²⁰¹ To satisfy the obligation, the government must consider “what factors significantly contributed to urban flight and what steps must be taken to

199. This would serve as a purpose statement for the AFFH mandate, as opposed to the more limited purpose statement for the AFH planning process featured in the 2015 Affirmatively Further Fair Housing rule. 24 C.F.R. § 5.150 (2017). It bears emphasizing that the AFFH mandate extends to all forms of segregation by protected class. This purpose statement speaks to the Act’s legislative history, which demonstrates that segregation by race and ethnicity were Congress’s primary concern in 1968.

200. See SCHWEMM, *supra* note 23, at 21:1 & nn.19–24 (citing cases).

201. *Id.* at n.27 (quoting *Otero v. N.Y. Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973)).

reverse the trend to prevent the recurrence of such blight.”²⁰² While such clarification might seem redundant to the phrase “*affirmatively further*,” clarification would put any doubt to rest.

Third, Congress should define key substantive terms, particularly the phrase “*affirmatively furthering fair housing*.” It should begin by adopting HUD’s carefully crafted definition in the 2015 AFFH Rule:

Affirmatively furthering fair housing means taking meaningful actions, in addition to combating discrimination, that overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity based on protected characteristics. Specifically, affirmatively furthering fair housing means taking meaningful actions that, taken together, address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws. The duty to affirmatively further fair housing extends to all of a program participant’s activities and programs relating to housing and urban development.²⁰³

This definition advances several goals. Critically, it would codify for the first time in statute what it means to “*affirmatively further*” the objectives of fair housing: to take meaningful steps to reduce disparities in access to opportunity, to replace segregated living patterns with integrated and balanced ones, to transform racially and ethnically concentrated areas of poverty into areas of opportunity, and to foster grantee compliance with fair housing laws. In particular, fostering compliance, the final objective, tracks this Article’s focus on creating a compliance norm among local jurisdictions. Congress should also incorporate other relevant definitions that give substantive meaning and context, including: fair housing choice, integration, segregation, meaningful action, and significant disparities in access to opportunity.²⁰⁴

Finally, Congress should explicitly address accountability. Specifically, it should amend section 3608 to reflect the minimum obligations of local jurisdictions receiving federal funds, HUD’s statutory obligation to enforce

202. *Id.* at nn.21–22 (quoting *Shannon v. U.S. Dep’t of Hous. & Urban Dev.*, 436 F.2d 809 (3d Cir. 1970)).

203. *Affirmatively Furthering Fair Housing*, 24 C.F.R. § 5.152 (2017).

204. *Id.*

this provision, and an accountability framework that mirrors the AFFH Rule. The open question is a matter of detail. Drafters must decide which details to include in the statute to simultaneously accomplish the goal of insulating the AFFH from regulatory rollback without frustrating future attempts to adapt the AFFH by regulation to improve its effectiveness. In other words, Congress must strike a balance between increasing local accountability without handcuffing future attempts to improve the AFFH process.

Amendment could take multiple forms. It might spell out Assessment of Fair Housing procedures with some specificity, borrowing from the AFFH Rule. It might include a requirement that local jurisdictions perform an assessment at periodic intervals using data provided by HUD and supplemented by local data, using a HUD template (possibly naming an Assessment Tool). At a minimum, it should state—unequivocally—that HUD has a statutory obligation to enforce this provision by monitoring local compliance with the AFFH mandate, and Congress must fund HUD at adequate levels to ensure compliance. Moreover, the amendment should establish an accountability framework that forestalls HUD from reverting to a meaningless certification process, as existed before the AFFH Rule. It might even spell out HUD's obligation to collect and maintain AFFH data and issue a publicly available annual report detailing its enforcement efforts (available to Congress for oversight). This amendment would increase both local accountability and give Congress more meaningful oversight authority if HUD fails to satisfy its affirmative duty.

2. Private Right of Action

The most conspicuous omission of the AFFH mandate is the lack of an express private right of action to enforce it. The Act defines “discriminatory housing practice” as a violation of various non-discrimination provisions, but the definition does not extend to the AFFH mandate.²⁰⁵ This means private parties cannot use existing statutory enforcement mechanisms in sections 3610–12 (administrative complaints to HUD) or section 3613 (private lawsuits) to enforce the mandate. This Section examines how to amend the Act to expand private enforcement against local jurisdictions (state and local actors or quasi-governmental actors like public housing

205. 42 U.S.C. § 3602(f) (2020) (defining “discriminatory housing practice” as an act that is unlawful under § 3604 (sale or rental of housing practices), § 3605 (residential real estate-related transactions), § 3606 (brokerage services), and § 3617 (interference, coercion, or intimidation in exercise of protected rights), but not § 3608 (the AFFH mandate)).

authorities), as opposed to lawsuits against HUD itself for failure to enforce.²⁰⁶ Private action has the potential to increase compliance through deterrence and cultivate a culture of compliance.

To date, AFFH enforcement lies almost exclusively in HUD's hands, despite the fact that private citizens and watchdog groups are a critical component of the accountability and enforcement mechanism for most civil rights laws. The National Commission recognized this problem in recommending that HUD at least make non-compliance "directly actionable through administrative complaints filed by individuals and organizations."²⁰⁷

This Article necessarily goes further. Informed by the limits of existing AFFH litigation, it is evident that third parties should be able to directly enforce the AFFH mandate in a judicial forum, not merely through administrative complaints. The prospect of private litigation is a critical way for injured parties to force meaningful action when HUD is intransigent. Put another way, private lawsuits will be most effective—and needed—when HUD shirks its affirmative duty to enforce the AFFH mandate.

The case for an express private right of action is built on the reality that an agency alone should not be the sole enforcement body, if for no other reason than HUD has proven inconsistent and unreliable at enforcing the mandate. At the same time, we must be cognizant that private action—standing alone—cannot realize the Act's objectives. Just as in the anti-discrimination context (the Act's twin objective), it is more effective to pair government and private action, one reinforcing the other.²⁰⁸

206. Robert Schwemm recounts the tortured history of actions against HUD in his comprehensive treatise. SCHWEMM, *supra* note 23, at §§ 21:5-21:7 (citing cases). Although it is beyond the scope of this Article, readers should note the First Circuit's more expansive interpretation of HUD's AFFH obligations, see *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987), as compared to the Eleventh Circuit, *Anderson v. City of Alpharetta, Ga.*, 737 F.2d 1530 (11th Cir. 1984), which was later followed by the Fourth Circuit, *Atkins v. Robinson*, 733 F.2d 318 (4th Cir. 1984), and Sixth Circuit, *Jaimes v. Toledo Met. Hous. Auth.*, 758 F.2d 1086 (6th Cir. 1985). The full extent of HUD's AFFH obligations has yet to be determined.

207. NATIONAL COMMISSION REPORT, *supra* note 107, at 46. For the National Commission's discussion of the AFFH mandate and recommendations to improve AFFH compliance, see *id.* at 37-43.

208. On the limits of a civil rights jurisprudence centered on the anti-discrimination mandate, see generally WEST, *supra* note 23 (examining the comparative advantages of rooting civil rights in natural law).

For much of the Act's history, private action has been the backbone of anti-discrimination enforcement.²⁰⁹ Prior to 1988, the Act did not authorize HUD to take meaningful action to adjudicate complaints.²¹⁰ Rather, it appears Congress assumed that the primary enforcement mechanism would be private action.²¹¹ Congress remedied that in 1988 by expanding HUD's authority to address residential discrimination. Since then, private actions have played a more complementary role in enforcement.²¹²

209. See, e.g., MASSEY & DENTON, *supra* note 1, at 197 ("This provision for individual litigation [under the anti-discrimination mandate] was the primary mechanism that Congress created to enforce the Fair Housing Act. According to the Supreme Court, 'HUD has no power of enforcement,' and the act's main enforcement mechanism 'must be private suits in which the complainant acts not only on their own behalf but also as private attorneys general in vindicating a policy that Congress considered to be of the highest priority.'" (quoting *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 209 (1972))).

210. *Id.* (discussing the enforcement structure prior to the Fair Housing Amendments Act of 1988) ("During the 1970s and 1980s, therefore, discriminators had little to fear from HUD or the Justice Department, and people who believed they had suffered racial discrimination were forced to initiate legal proceedings on their own.").

211. *Id.* at 197–98. Prior to 1988, private litigation had its own weaknesses, including that "complainants were only entitled to sue for actual damages and a mere \$1,000 in punitive awards," had to pay their own court costs and attorney's fees "unless the court ruled they were financially unable to assume the burden" and were subject to a short statute of limitations of 180 days or 30 days from the end of HUD mediation. "The resulting contest was inherently unequal, so that enforcement efforts were intrinsically flawed and structurally condemned to ineffectiveness In practice . . . [the Act] allowed a few victims to gain redress, but it permitted a larger system of institutionalized discrimination to remain in place." *Id.* at 198.

Certainly, the U.S. Department of Justice achieved some landmark fair housing victories. See, e.g., *United States v. City of Black Jack, Missouri*, 508 F.2d 1179 (8th Cir. 1974); *United States v. Yonkers Bd. of Educ.*, 624 F. Supp. 1276 (S.D.N.Y. 1985). It also appeared to take more cases after Congress amended the FHA in 1988. See, e.g., Leland B. Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. 59, 106–07 (1993).

212. See, e.g., MASSEY & DENTON, *supra* note 1, at 205–12 (describing "glimmers of hope" but cautioning that the amendments "still lean heavily on the efforts of individuals, and success will be heavily determined by the institutional backing given to these 'private attorneys general' by the President, the Justice Department, and HUD.").

In the AFFH context, private enforcement has been stymied by the lack of an express private right of action to enforce the AFFH mandate, 42 U.S.C. § 3608. Perhaps the most significant breakthrough in AFFH enforcement came when private actors sued Westchester County on a False Claims Act theory.²¹³ But such claims have limited application.²¹⁴ They are only likely to prevail where a grantee literally falsified its federal grant application by failing to undertake even a nominal fair housing analysis of race. Since the historic *Westchester* settlement, grantees have presumably taken steps to insulate themselves from false claims liability.

While private litigation has played a consequential role in enforcement, it is not a panacea. In many ways it is inferior to public enforcement. The federal government has incomparably better leverage and reach to instill a culture of compliance across local governments. It cannot be denied that HUD's vast transfer of resources to local grantees is the primary leverage point available to enforce the AFFH mandate. The federal government thus wields the most effective carrots and sticks.²¹⁵

213. *Supra* Part II.A.4.

214. *Id.* For an extended discussion, see Hayes, *supra* note 105 (discussing post-*Westchester* legal developments, including the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, at § 10104(j)(2), which lowered the “public disclosure bar,” which “had been one of the most difficult barriers for realtors to overcome” in pursuing FCA actions, and “reversed a recent Supreme Court decision [*Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 559 U.S. 280 (2010)] holding that disclosures in state or local government reports or proceedings barred actions”).

215. *See, e.g.*, Bostic & Acolin, *supra* note 52, at 191 (discussing the AFFH mandate's carrots and sticks). Some jurisdictions opt out of federal funding for housing and community development (e.g., Community Development Block Grants) to avoid the binding stipulations. Such jurisdictions tend to be more affluent communities, although not exclusively. *See* Hoopes, *supra* note 164 (discussing one community's decision-making process on federal funding in light of AFFH requirements). To the extent that H.U.D.'s community development funds are not sufficiently enticing, U.S. Department of Transportation dollars are considerably larger, and thereby more tempting, with the result that that few local jurisdictions are willing to leave them on the table. The AFFH mandate's broad text extends to all “programs and activities relating to housing and urban development” in “[a]ll executive department and agencies,” which may implicate a variety of grant programs related to urban development, from infrastructure to sewers to highways. *See* 42 U.S.C. § 3608(d) (2015). Thus, D.O.T. funding could provide significant additional

Empirically, HUD has proven that it will not consistently enforce the AFFH mandate. Where HUD neglects its duties, there must be outside leverage to compel action. Accordingly, while Congress should strengthen, or at least clarify, HUD's AFFH duties, a private right of action is critical.

One way to establish an express private right of action is simply to amend the definition of "discriminatory housing practice" to include violations of the AFFH mandate. For instance, § 802(f), codified as 42 U.S.C. § 3602(f), could be amended as follows: "(f) Discriminatory housing practice" means an act that is unlawful under section 804, 805, 806, or 818 of this title, *or failure to comply with section 808(d) or any regulation promulgating section 808(d)*."²¹⁶ This amendment would allow private litigants to use existing enforcement mechanisms in 42 U.S.C. § 3613. One resolution to enact a similar amendment has been introduced in the U.S. House of Representatives.²¹⁷

Alternatively, Congress could fashion a new AFFH enforcement provision that details the elements of a cause of action. This approach may provide more predictability to local jurisdictions and thereby enhance deterrence. Its exact form depends on how Congress describes a jurisdiction's AFFH obligations within the statutory text. For guidance on the elements of a private cause of action against local jurisdictions, drafters might look to the First Circuit's discussion of a cause of action against HUD in *NAACP Boston Chapter v. HUD*.²¹⁸ In that case, a local NAACP chapter sued HUD for failing to aggressively enforce its AFFH duties against the City of Boston. Proceeding under the Administrative Procedure Act (APA), then-First Circuit Judge Stephen Breyer described the standard:

leverage to incentivize compliance. This is the subject of a forthcoming article. For a parallel discussion of the mandate's application to Treasury Department funds, see Schwemm, *supra* note 55, at 146–47 & nn.129–30 (citing J. William Callison, *Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit*, 19 S. CAL. REV. L & SOC. JUST. 213, 225 (2010); Florence Wagman Roisman, *Mandates Unsatisfied: The Low Income Housing Tax Credit Program and the Civil Rights Laws*, 52 MIAMI L. REV. 1011, 1029–49 (1998); and 26 C.F.R. §1.42-9(a)).

216. The italicized text reflects the amended language.

217. At least one bill has been introduced in Congress proposing a substantially similar amendment. Housing Opportunities Made Equal (HOME) Act, H.R. 6500, 111th Cong. (2010) (redefining "discriminatory housing practice" to include violation of § 808(e)(5)). The bill never saw a committee hearing or vote. More effective would be including all AFFH violations by all agencies under § 3608(d), not solely HUD under § 3608(e)(5).

218. *NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987).

[T]he court must decide whether, over time, HUD's pattern reveals a failure to live up to its obligation [under § 3608]. The standard for reviewing that pattern can be drawn directly from the statutory instruction to "administer" its programs "in a manner affirmatively to further the policies" of "fair housing." This standard, like many, may be difficult to apply to borderline instances, yet a court should be able to determine clear failure to live up to the instruction over time. . . . [T]his case seems to call for a more straightforward evaluation of whether agency activity over time has furthered the statutory goal, and, if not, for an explanation of why not and a determination of whether a given explanation, in light of the statute, is satisfactory.²¹⁹

In other words, the First Circuit recognized as legally cognizable a claim for violation of the APA where HUD failed, over time, to fulfill its statutory obligation to administer its programs in a manner that affirmatively furthered fair housing objectives.

Directing a similar challenge against a local jurisdiction (for violation of the Fair Housing Act, as opposed to the APA), at least two theories of liability may be available. The broader theory would be a jurisdiction's failure to comply with the AFFH over time. This is most comparable to the APA challenge above. A jurisdiction might be liable for failing to assess barriers to fair housing and take affirmative steps to overcome those barriers. Liability might turn on the broader question of whether the jurisdiction received federal funding but failed to take meaningful action to address fair housing barriers, more likely in terms of process or effort than outcomes.²²⁰

A narrower theory would be liability for material noncompliance with specific AFFH obligations, such as the failure to submit an AFH, failure to consider and analyze data that could materially alter its fair housing analysis, or failure to provide meaningful opportunities for public participation. Relief would be commensurate with the nature of the material violation, in light of the most suitable remedy to advance fair housing objectives. For predictability and deterrence, HUD should promulgate guidance as to what constitutes a material violation, ideally based on examples from Congress in a committee report or other legislative history. A word of caution, drafters must be cognizant of the history of reluctance among local jurisdictions to transparently report their progress—or lack

219. *Id.* at 158 (citations omitted).

220. This proposal naturally raises the question of who has standing to sue. For a discussion of existing standing caselaw in the context of § 3608, see SCHWEMM, *supra* note 23, at § 12A:7.

thereof—for fear of liability. The best approach is likely to strike a balance similar to the AFFH Rule, which is not overly punitive and builds in procedures for resubmission.²²¹ Regardless of its precise form, an express private right of action has the potential to meaningfully enhance AFFH enforcement by holding local jurisdictions more accountable.

3. Mobility Programs & Other Statutory Enhancements

Inextricably intertwined with the concept of housing integration is housing mobility—the freedom to move between neighborhoods. This Section explores the benefits of amending the Act to complement the AFFH mandate, with a particular emphasis on statutory enhancements that would improve voluntary mobility across neighborhoods within any community.

One increasingly common proposal is to amend the Act to make “source of income” a new protected class. This proposal straddles both the integration and anti-discrimination mandates of the Act by making it unlawful to reject tenants who pay their rent with government-subsidized rental assistance, opening communities to more diverse renters.²²²

221. See 24 C.F.R. § 5.162 (2015) (AFH review); 24 C.F.R. § 5.164 (2015) (revision and resubmission); 80 Fed. Reg. 42,272, 42,311–312 (responding to public comments on the review process).

222. While this Article embraces mobility as one tool to deconstruct segregation, it does not endorse mobility over place-based investment. Nor does it seek to idealize or overstate the benefits of mobility programs. Mobility is not a panacea to dismantle segregation. Among their downsides, mobility programs tend to place one-sided burdens on communities of color because they frequently involve voluntary relocation of communities of color to predominantly white high opportunity communities. Many valid critiques of mobility programs exist, including their failure to address the root causes of poverty, “toxic stress,” and “the racism that led to Black urban ghettos.” Arline T. Geronimus & J. Phillip Thompson, *To Denigrate, Ignore, or Disrupt: Racial Inequality in Health and Impact of a Policy-induced Breakdown in African American Communities*, 1 DU BOIS REV. 247, 247–79 (2004), <https://www.cambridge.org/core/journals/du-bois-review-social-science-research-on-race/article/to-denigrate-ignore-or-disrupt-racial-inequality-in-health-and-the-impact-of-a-policy-induced-breakdown-of-african-american-communities/6E8565ECC036B7F8456AE0E23261AE9C> [<https://perma.cc/VG48-NSKM>] (criticizing the Moving to Opportunity mobility study of the 1990s).

With that in mind, segregation can also yield disproportionate harms for communities of color that must be acknowledged—harms that warrant the

Currently, seventeen states and approximately ninety cities and counties prohibit source-of-income discrimination.²²³ This protection serves to minimize disparate treatment for people who pay rent with a disfavored source of income—typically housing vouchers. Source of income protection also benefits veterans who receive government benefits as a result of military service, another status subject to some negative stereotypes.²²⁴

option of offering voluntary mobility as one avenue to reduce fair housing barriers and open housing opportunities. *See, e.g.*, INST. ON METRO. OPPORTUNITY, AMERICAN NEIGHBORHOOD CHANGE IN THE 21ST CENTURY 28–34 (Apr. 2019), https://www.law.umn.edu/sites/law.umn.edu/files/metro-files/american_neighborhood_change_in_the_21st_century_-_full_report_-_4-1-2019.pdf [<https://perma.cc/PV58-XGQ4>]. This is especially true in light of research documenting the significant quality-of-life outcomes associated with voluntary mobility programs. *E.g.*, Chetty et al., *supra* note 37.

For a discussion of a “balanced approach” that balances both place-based and mobility strategies—as opposed to prioritizing one over the other—see John A. Powell & Stephen Menendian, *Opportunity Communities: Overcoming the Debate over Mobility Versus Place-Based Strategies*, in THE FIGHT FOR FAIR HOUSING 207–27 (Gregory D. Squires ed., 2018); *see also* Edward G. Goetz & Myron Orfield, *Up for Discussion—Regionalism and Affordable Housing*, 2 J. COMP. COMM. DEV. (Dec. 2011), <http://archive.instituteccd.org/news/3262> [<https://perma.cc/38GU-EQR6>] (illustrating the debate over place-based versus mobility strategies); Sara Pratt, *Civil Rights Strategies to Increase Mobility*, 127 YALE L. J. FORUM 498, 518 & nn.100–01 (2017) (“Any discussion of mobility in the civil rights context must consider the concomitant obligation of communities to invest in neighborhoods and segregated and poor areas, which HUD and others refer to as a ‘balanced approach.’”); Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,278 (July 16, 2015) (clarifying that the AFFH Rule does not prioritize mobility strategies over place-based investment but allows jurisdictions to decide).

223. POVERTY & RACE RESEARCH ACTION COUNCIL, EXPANDING CHOICE: PRACTICAL STRATEGIES FOR BUILDING A SUCCESSFUL HOUSING MOBILITY PROGRAM (Dec. 11, 2019), at App. B, <https://prrac.org/pdf/AppendixB.pdf> [<https://perma.cc/KA8K-7LDC>] (cataloguing the patchwork of state and local source-of-income laws).

224. A bill that reflects an attempt to address discrimination against veterans proposes the addition of both source-of-income and veterans-status protections to the Fair Housing Act. Fair Housing Improvement Act of 2018, S. 3612 115th Cong. (2018) (prohibiting housing discrimination based on “source of income or veteran status”); *see also* Press Release, U.S. Senator Tim Kaine, Kaine, Hatch Bill Would Protect Veterans, Low-Income Families From

It is not novel to require equal treatment of renters regardless of what legal source of income they use to they pay their rent. Indeed, some cities and states passed laws as early as the 1970s and 1980s to prohibit source of income discrimination.²²⁵ Most state and local protections define “source of income” to expressly include government-subsidized rental assistance.²²⁶

The Housing Choice Voucher (HCV) program (commonly referred to as Section 8) is the federal government’s principal subsidized housing program for extremely low-income families, the elderly, and individuals with disabilities.²²⁷ HUD provides funding for the HCV program through local public housing authorities (PHAs), which administer the program locally.²²⁸

Housing Discrimination (Nov. 13, 2018), <https://www.kaine.senate.gov/press-releases/kaine-hatch-introduce-bipartisan-bill-to-protect-veterans-and-low-income-families-from-housing-discrimination/> [<https://perma.cc/DAF3-DXQJ>].

225. See POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 223, at app. B (listing laws by state and enactment date, including early adopters like Massachusetts (1971), Maine (1975), North Dakota (1983), and Oklahoma (1985)); see also Robert Schwemm, *Source-of-Income Discrimination and the Fair Housing Act*, 70 CASE W. RES. L. REV. 573, 591 (forthcoming 2020) (describing the recent momentum in adoption of these laws) (“A handful of these laws date back to the 1970s and another twenty were passed in the 1980s and 1990s, but most—over fifty—have been enacted since 2000, with New York state and Los Angeles (both city and county) being the most recent.”).
226. See POVERTY & RACE RESEARCH ACTION COUNCIL, *supra* note 223, at App. B.
227. See Complaint, Nat’l Fair Hous. All. v. Evolve LLC, No. 1:19-cv-1147 (D.D.C.) (citing Housing and Community Development Act of 1974, Pub. L. No. 93-383, Title II, § 201(a), 88 Stat. 633, 662–66, now codified at 42 U.S.C. § 1437f; 24 C.F.R. § 982.1 *et seq.*). This description of the Housing Choice Voucher Program and source of income discrimination was drafted in collaboration with court-certified student attorneys in the Georgetown University Law Center’s Civil Rights Clinic. See *id.* at 4–5.
228. The HCV program makes rent affordable by fixing the family’s portion of rent to its household income. If a voucher holder finds eligible housing, she pays a percentage (generally 30 percent) of her household income to the landlord and the PHA pays the landlord the remaining market-value rent. See 24 C.F.R. § 5.628 (total tenant payment); § 982.505(b) (monthly assistance payment). For instance, a low-income family with a monthly household income of \$1,500 might pay \$500 for an apartment with a market-rate rent of \$1,200 and the PHA would pay the remaining \$750 to the landlord. In other words, the landlord receives the same amount of rent regardless of whether the tenant

By offering participants choices, the HCV program is designed as a pathway from low-opportunity to high-opportunity neighborhoods. Designed this way, voucher holders are uniquely susceptible to source of income discrimination because the burden is on them to find a landlord who will accept their voucher. Finding an available unit is typically the most difficult part of the voucher obstacle course. Where source of income discrimination is prohibited, the law requires the landlord to accept the voucher as rental payment if the tenant otherwise qualifies for the unit (i.e., may not reject the tenant because she seeks to pay with a voucher).²²⁹ Where source of income discrimination is not prohibited, the landlord may reject all vouchers as a blanket policy. In the U.S., wages have not kept pace with the rising cost of housing. Voucher discrimination exacerbates the extreme affordable housing shortage in many U.S. cities, narrowing housing options and significantly reducing the likelihood that a voucher holder will find an eligible rental unit.²³⁰ Those that do not find a landlord to accept

has a voucher. 24 C.F.R. § 982.1 (describing Housing Choice Voucher Program's purpose and structure); *see also* 24 C.F.R. § 5.628; § 982.505(b).

229. A separate challenge riddling many jurisdictions is enforcement. Despite long-standing source-of-income discrimination bans, many landlords still exclude voucher holders in practice. *See, e.g.*, Mary K. Cunningham, *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers*, URBAN INST. (2018) (reporting significant violation rates among landlords).

230. *See, e.g., id.*; *see also* Martha M. Galvez, *What Do We Know About Housing Choice Voucher Program Location Outcomes?*, URBAN INST. (Aug. 2010), <https://www.urban.org/sites/default/files/publication/29176/412218-What-Do-We-Know-About-Housing-Choice-Voucher-Program-Location-Outcomes-.PDF> [<https://perma.cc/82KZ-H8TG>] (highlighting the empirical challenges with placing a voucher in the private market and barriers to using vouchers in neighborhoods with less concentrated poverty); Alicia Mazzara & Brian Knudsen, *Where Families With Children Use Housing Vouchers: A Comparative Look at the 50 Largest Metropolitan Areas*, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 3, 2019), <https://www.cbpp.org/research/housing/where-families-with-children-use-housing-vouchers> [<https://perma.cc/8UKZ-TJGG>] (analyzing voucher outcomes using data from fifty metropolitan areas).

For a discussion of how the Housing Choice Voucher Program was not designed to address segregation or otherwise deconcentrate poverty, *see* Stacy Seicshnaydre, *Missed Opportunity: Furthering Fair Housing in the Housing Choice Voucher Program*, 79 L. & CONTEMP. PROBS. 173, 173–74 (2016) (HUD “never structured the program to address segregation, deconcentrate low-income persons, expand housing choice, or further fair housing. . . . [But the AFFH Rule] imposes detailed fair housing planning obligations on [public

their voucher lose their chance and are unlikely to get another one. In other words, voucher discrimination is one example of how landlords limit neighborhood choice and undermine the effectiveness of the HCV program.

Prohibiting source of income discrimination opens rental opportunities in otherwise difficult-to-reach communities, and beyond poverty-concentrated neighborhoods often saturated with vouchers.²³¹ In that regard, it has the potential to be a useful tool to advance integration. Moreover, it is a necessary public policy correction. Voucher discrimination indisputably undermines the HCV program's effectiveness. Thus, beyond its integration benefits, banning source of income discrimination would have the practical impact of enhancing how the voucher program itself operates, as the programs arguably most notorious shortcoming is the lack of landlords accepting vouchers on the private rental market.²³²

4. Viability of Reform

In today's political climate, it is easy to dismiss as impractical or ill-timed any call for congressional action. Cognizant of political realities, this Section takes a hard look at critiques, with a focus on (1) political will and (2) HUD's capacity to enforce a robust AFFH mandate. Ultimately, advocates must be poised to seize the moment of opportunity when it arrives. To dismantle segregation, a campaign to amend the Act must be a top

housing authorities] that administer voucher programs. These obligations provide the potential, yet again, for the HCV Program to achieve its intended purpose and expand housing choices for all.”).

231. See Final Rule, Establishing a More Effective Fair Market Rent System; Using Small Area Fair Market Rents in the Housing Choice Voucher Program Instead of the Current 50th Percentile FMRs, 81 Fed. Reg. 80,567, 80,567 (Nov. 16, 2016) (implementing new payment standard options using rents calculated for zip codes within a metropolitan area, instead of a metropolitan-wide standard). The Small Area Fair Market Rent standard, coupled with source of income discrimination prohibitions, has the potential to significantly improve mobility opportunities.

232. See Seicshnaydre, *supra* note 230. For a discussion on the effectiveness of mobility programs at advancing fair housing objectives, see Will Fischer, *Research Shows Housing Vouchers Reduce Hardship and Provide Platform for Long-term Gains Among Children*, CTR. ON BUDGET & POL'Y PRIORITIES 4–5 (Oct. 7, 2015), <https://www.cbpp.org/research/housing/research-shows-housing-vouchers-reduce-hardship-and-provide-platform-for-long-term> [<https://perma.cc/XEH2-5T52>]; Chetty et al., *supra* note 222.

legislative priority, one worth waging regardless of the precise day the opportunity arises.

The question of whether a statutory amendment is a viable strategy is foundational. Embedded are questions of political will and the risks inherent to reopening any law to amendment. This Article argues that advocates should pursue a dual-track approach. Advocates should undoubtedly continue to defend AFFH progress, such as pursuing the APA litigation to stop rollback of the AFFH Rule featured as a case study in Part II.

Nevertheless, advocates must know their next hand. When the political winds shift, advocates will need to know where to press and how. For instance, they need to be prepared to offer effective amendments with a likelihood of success in advancing AFFH objectives—particularly those aimed at correcting fundamental design flaws described in Part II that will instantiate a durable culture of local compliance.

In *Stamped from the Beginning*, author Ibram X. Kendi reminds us that “racist progress has consistently followed racial progress.”²³³ This framework is helpful not only for tracing the history of what he calls a “dual and dueling history of racial progress and the simultaneous progress of racism.”²³⁴ It is likewise helpful to look at the AFFH mandate’s history as a microcosm of this greater trend. First, there was the achievement of the Act’s very passage, then decades of racist stalling, then promulgation of a regulation that was “radical”²³⁵ to some—but definitively pragmatic to others—that represented more progress, and then there was a systematic attempt to dismantle it. That brings us to this moment. A prominent progressive lawmaker has described our country’s pattern of progressive progress as a series of short-lived “burst[s]” of activity on civil and social rights with “profound,” impact, but ones that are typically followed by longer intervals in which the progressive accomplishments must be defended vigilantly until the next progressive burst.²³⁶

233. Ibram X. Kendi, *STAMPED FROM THE BEGINNING* xi (2017).

234. *Id.* at x (emphasis omitted).

235. *E.g.*, Stanley Kurtz, Opinion, *Massive Government Overreach: Obama’s AFFH Rule is Out*, NAT. REV. (July 8, 2015), <https://www.nationalreview.com/corner/massive-government-overreach-obamas-affh-rule-out-stanley-kurtz> [<https://perma.cc/QCJ8-D876>].

236. SHERROD BROWN, DESK 88 13–18 (2019) (describing four progressive eras in U.S. politics and the progressive lawmakers who shared his Senate desk—number 88).

What might we draw from this history? Opportunity may be upon us. The year 2020 brought seismic shifts. In addition to a generation-defining global pandemic and economic crisis, we are experiencing a new wave of public outrage at our racist past and present. This may be a new era of public accountability—a time of line-drawing between leaders who support—and those who oppose—transformative policies that actually account for racism and seek to overcome it.

The work will not be in vain. Whether the opportunity to amend emerges in 2021, it will eventually surface if advocates continue to coalesce around the bipartisan findings of the National Commission. In other words, this is a campaign worth waging, and its momentum could influence when the moment of opportunity arises.²³⁷

Related is whether reopening the Act might backfire by exposing it to “poison pill” amendments or otherwise compromise its enforcement mechanisms. Two points warrant mention. First, that is always a risk. But, it is a risk that advocates routinely manage through coordination with caucus and floor leaders to set parameters on prospective amendments that warrant pulling the bill. Advocates should define the boundaries, backed by specific examples of how anticipated amendments would undermine the Act. Second, we must consider the baseline from which to measure risk. In the case of the AFFH mandate, there is only so far to fall. While there is some risk the mandate could be removed, it’s unlikely. In other words, there is only room for improvement. The bigger risk is to the anti-discrimination provisions—the provisions that define what discriminatory practices violate the Act and how they may be enforced. For instance, opponents might undermine enforcement mechanisms by limiting damages or other relief, or gut discriminatory effect theories of liability—disparate impact and segregative effect. These risks are real, but they relate back to the first point. As with any legislative battle, there are pitfalls and traps to be anticipated and strategically managed. Extant risk is no reason to disregard the acute need for amendment.

One hopeful development is growing bipartisan support for housing mobility programs.²³⁸ In February 2019, Congress passed and President

237. For a discussion of the political maneuvering that resulted in the 1988 Fair Housing Amendments Act, see MASSEY & DENTON, *supra* note 1, at 209–10.

238. See, e.g., Clinton Jones, Chief Hous. & Ins. Counsel to House Fin. Services Comm. (Majority), Remarks to Conference Panel 4: Funding Housing Mobility, Seventh Annual Conference on Housing Mobility (October 16-17, 2018) (notes on file with author) (conference hosted by the Poverty & Race Research Action Council, MobilityWorks, and the Council of Large Public Housing

Trump signed a final fiscal year 2019 budget appropriating \$28 million for a mobility demonstration project.²³⁹ This is the first time Congress has funded a housing mobility initiative since the early 1990s.²⁴⁰ One reason

Authorities) (panelists: Clinton Jones; Jennifer Sharpiro, Chief of Staff to Congressman Emanuel Cleaver; Karolina Arias, Policy Advisor to Senator Chris Van Hollen; panel moderated by Barbara Sard of the Center for Budget and Policy Priorities). Conference program available at <https://prrac.org/mobility2018/housingmobilityprogram2018.pdf> [<https://perma.cc/F9U3-3LLL>]; see also Powell et al., *supra* note 222 (“Mobility approaches have quietly gained ground in recent decades, especially in light of the failure of public housing policies that exacerbated racial segregation while consigning residents to bleak environments of concentrated poverty.”).

239. Consolidated Appropriations Act of 2019, Pub. L. No. 116–6, 133 Stat. 13, 438; Alison Bell, *HUD Funding Bill Will Launch Housing Voucher Mobility Demonstration*, CTR. ON BUDGET & POL’Y PRIORITIES (Feb. 15, 2019), <https://www.cbpp.org/blog/hud-funding-bill-will-launch-housing-voucher-mobility-demonstration> [<https://perma.cc/G54J-SA4U>] (discussing the housing mobility bill from 2017–2018 that was replicated in the final budget agreement for fiscal year 2019). Similarly, Congress appropriated an additional \$25 million for a mobility demonstration project for fiscal year 2020. Further Consolidated Appropriations Act, 2020, Pub. L. No. 116–94, Div. H, Tit. II, 133 Stat. 2534, 2980 (2020) (allocating \$28 million for mobility demonstration to enable PHAs to administer the HCV program in a manner that encourages families with children to move to lower-poverty areas and expand access to opportunity); see also Althea Arnold, *Congress Reaches FY 2020 Spending Deal with Increased Funding for Affordable Housing*, NAT’L COUNCIL OF STATE HOUS. AGENCIES (Dec. 17, 2019), <https://www.ncsha.org/blog/congress-reaches-fy-2020-spending-deal-with-increased-funding-for-affordable-housing> [<https://perma.cc/36WA-DTC4>] (describing the \$25 million federal investment in voucher mobility programs, which includes \$20 million to be competitively awarded to public housing agencies for mobility-related services and \$5 million for new vouchers, in addition to \$23.8 billion for voucher renewals); Douglas Rice, *House Bill Includes Major Investments to Help Families Pay Rent*, CTR. ON BUDGET & POL’Y PRIORITIES (May 22, 2019), <https://www.cbpp.org/blog/house-bill-includes-major-investments-to-help-families-pay-rent> [<https://perma.cc/9APP-BNEB>] (discussing the benefits of the mobility program).
240. Some advocates may recall that the federal government previously funded a pilot project, Moving to Opportunity (“MTO”) in the 1990s. Many observers have criticized MTO for failing to produce evidence that mobility improves outcomes. However, “[t]here was nothing wrong with the earlier round of MTO evaluations in themselves: the main problem was that the positive

mobility programs garner bipartisan support harkens back to The Opportunity Agenda's messaging—it is a commonly held and widely shared value that a child's life opportunities should not be determined by the zip code in which they live.²⁴¹

These developments give reason for hope that similar bipartisan inroads can be made under the auspices of increasing access to opportunity, especially in light of promising research demonstrating the significant benefits to low-income children who relocate to high-opportunity neighborhoods, particularly in terms of academic achievement, post-secondary education attendance, future employment, and breaking the cycle of generational poverty.²⁴² Thus, there is room for hope, even in a fractured Congress.

Finally, a look back to 1988 is a reminder that the Fair Housing Act has a bipartisan history. It was passed—and amended—during contentious times, the result of cross-aisle brokering. Indeed, that rancor produced less-than-desirable legislation, but it was nonetheless a step forward that

effects of leaving poor neighborhoods as a child could not be observed until the children were old enough to finish college and enter the adult labor market.” Jonathan Rothwell, *Sociology's Revenge: Moving to Opportunity (MTO) Revisited*, BROOKINGS INST. (May 6, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/05/06/sociologys-revenge-moving-to-opportunity-mto-revisited/> [<https://perma.cc/4ML3-DAZ5>]. New research establishes that the place where children are raised generally—and mobility programs specifically—make a measurable difference. See Chetty et al., *supra* note 37; Chetty & Hendren, *supra* note 37.

New mobility programs nonetheless draw lessons from MTO. Modern mobility programs incorporate pre-move and post-move counseling to help participants through the sometimes-rocky transition to an unfamiliar new neighborhood.

241. See *supra* note 238. Countless statements across the political spectrum reinforce this message. See, e.g., Secretary Betsy DeVos (@BetsyDeVosED), TWITTER (Feb. 28, 2017 10:29 PM) <https://twitter.com/betsydevosed/status/836780493064581120> [<https://perma.cc/BPZ8-FGBZ>] (“No child, regardless of their ZIP code or family income, should be denied access to quality education.”); Bill Chappell & Scott Neuman, *Who is Alexandria Ocasio-Cortez*, NAT’L PUB. RADIO (June 27, 2018), <https://www.npr.org/2018/06/27/623752094/who-is-alexandria-ocasio-cortez> [<https://perma.cc/4NKP-YQN5>] (“I was born in a place where your ZIP code determines your destiny.”) (quoting U.S. Rep. Alexandria Ocasio-Cortez).

242. See Chetty et al., *supra* note 37; Chetty & Hendren, *supra* note 37.

produced at least some meaningful results. In the case of 1988, legislators of both parties understood the anti-discrimination provisions of the 1968 Act were glaringly defective.²⁴³

Despite rancor and partisan divide, Congress passed and President Reagan signed the Fair Housing Amendments Act.²⁴⁴ Advocates told a successful narrative: the compromise original Act needed effective enforcement mechanisms. Today, advocates have a parallel case: the AFFH mandate needs meaningful enforcement mechanisms. As currently configured, the mandate has little likelihood of reducing segregation. Ultimately, the lessons of 1988 may prove instructive for today's advocates.

Likewise, fair housing advocates and opponents alike question whether HUD has the capacity to meaningfully enforce a robust AFFH mandate. The critique is valid and not lost on HUD. There is long-running consensus that HUD is understaffed.²⁴⁵ Each of the three investigative reports into AFFH compliance underscored the problem.

In 2008, the National Commission observed:

HUD has chronically understaffed its fair housing enforcement, and many staff are poorly trained and directed about how to accomplish

243. *E.g.*, MASSEY & DENTON, *supra* note 1, at 210 (“In one bold stroke, the amendments remedied the principal flaws of the 1968 act that had been so well documented in two decades of Congressional hearings, court cases, government reports, and academic treatises.”).

244. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601–19 (2017)). For a play-by-play of the FHAA's procedural history, see MASSEY & DENTON, *supra* note 1, at 208–10; Ware, *supra* note 211 at 83–87 (1993) (detailing bipartisan attempts to amend the Act); *see also* President Ronald Reagan, Remarks on Signing the Fair Housing Amendments Act of 1988, (Sept. 13, 1988), <https://www.reaganlibrary.gov/archives/speech/remarks-signing-fair-housing-amendments-act-1988> [<https://perma.cc/JN7A-MVS7>]; 134 CONG. REC. S12449-02 (Sept. 14, 1988) (Senator Kennedy responding to President Reagan's signing statement).

245. One proposal that warrants additional consideration is separating HUD's civil rights enforcement branch—the Fair Housing and Equal Opportunity Office—from HUD's hydra. It could, for instance, exist as a stand-alone agency akin to the U.S. Equal Employment Opportunity Commission (EEOC). Such an agency would be responsible for enforcing federal laws that make it unlawful to discriminate against a person in the provision of housing because of the person's race, color, national origin, religion, sex, disability, or familial status. The comparative benefits of a separate agency, and how the agency might enforce the AFFH mandate, are the subject of a forthcoming article.

fair housing enforcement. At least 750 [full-time equivalent employees (FTEs)] are necessary for the existing fair housing work alone. HUD's staffing of the entire Office of Fair Housing and Equal Opportunity (FHEO) office, which has responsibility for enforcement as well as program compliance monitoring, has not reached that staffing level since FY 1994. At 579 FTEs in FY 2007, the staffing numbers for FHEO are wholly inadequate and at their lowest since 1989.²⁴⁶

The 2010 GAO report concurred, noting that HUD officials blamed inadequate staffing for their limited oversight capacity.²⁴⁷ HUD's 2009 internal study found the same.²⁴⁸ Nevertheless, the trend continued for another decade.²⁴⁹ In 2019, the fair housing office had 430 full-time

246. NATIONAL COMMISSION REPORT, *supra* note 107, at 17; NAT'L FAIR HOUS. ALL., MAKING EVERY NEIGHBORHOOD A PLACE OF OPPORTUNITY: 2018 FAIR HOUSING TRENDS REPORT 93–98 (2018), https://nationalfairhousing.org/wp-content/uploads/2018/04/NFHA-2018-Fair-Housing-Trends-Report_4-30-18.pdf [<https://perma.cc/9T7Q-4PT5>] (advocating increased funding for HUD's Fair Housing and Equal Opportunity Office to enhance its capacity to hold grantees accountable for AFFH compliance).

247. GAO REPORT, *supra* note 103, at 25.

248. HUD STUDY, *supra* note 113, at 26; *see also Reconstructing Fair Housing*, NAT'L COUNCIL ON DISABILITY 7 (Nov. 6, 2001), https://ncd.gov/rawmedia_repository/c8b3f693_4dbb_482d_92c7_b16d37858b4c.pdf [<https://perma.cc/4RP8-3MKL>] (reporting on HUD's chronic understaffing and inadequate staff training); *id.* at 8 ("This report concludes that HUD has major challenges ahead of it to fulfill the promise of civil rights enforcement. Without staffing and funding resources, progress cannot and will not be made."); NATIONAL COMMISSION REPORT, *supra* note 107, at 17 (documenting a staff of 579 employees in 2007, down from 750 in 1994).

249. Alec MacGillis, *Is Anybody Home at HUD?*, PROPUBLICA (Aug. 22, 2017), <https://www.propublica.org/article/is-anybody-home-at-hud-secretary-ben-carson#> [<https://perma.cc/R5D3-KWLG>] (counting HUD's overall ranks at 8,000 employees, approximately half of the 16,000 employees decades earlier); *see also* Tracy Jan, *Ben Carson's HUD: Political Loyalty Required, No Experience Necessary*, WASH. POST (Sept. 20, 2018), https://www.washingtonpost.com/business/economy/ben-carsons-hud-political-loyalty-required-no-experience-necessary/2018/09/20/addb8e74-9b0c-11e8-b60b-1c897f17e185_story.html?noredirect=on&utm_term=.8ae185c7577f [<https://perma.cc/Q7BF-HBSK>] ("The lack of experience in a chronically understaffed agency brought even routine work to a halt for much of Carson's first year at HUD because none of the appointees

equivalent employees, or about fifty-seven percent of the staff level recommended by the National Commission *before* implementation of the new AFFH Rule.²⁵⁰

HUD is well aware of the problem. It explicitly acknowledged in the AFFH rulemaking process that it would need to expand staffing levels to provide technical support for AFH review.²⁵¹ Indeed, its final rule even included specific costs estimates to “hire staff to implement the rule[,] provide data support[,] and review submitted AFHs.”²⁵² Other contemporaneous documents confirm that HUD planned staff increases and training and as a part of its rulemaking process, anticipating the need to scale up technical assistance, especially during the early years of the learning curve.²⁵³ In short, HUD has always known that more robust enforcement would require more resources.

Since the Rule’s release, scholars continue to emphasize the correlation between HUD resources and meaningful AFFH enforcement,²⁵⁴ particularly for smaller and under-resourced communities with greater need for HUD’s technical assistance. They are more dependent on HUD’s guidance to identify and overcome fair housing barriers.²⁵⁵ In short, those scholars observed, local governments are waiting to see if HUD will be a true partner to grantees in realizing the benefits of the AFFH Rule.²⁵⁶

Nevertheless, several considerations suggest HUD’s capacity does not wholly undercut the AFFH Rule. First, the administrative record shows that

felt comfortable signing off on grants and technical guidance, according to career staffers.”).

250. U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 134, at 234–35 (compiling testimony on HUD’s limited workforce and civil rights enforcement capacity).

251. *E.g.*, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,350 (July 16, 2015).

252. *Id.*

253. In its notice of a final rule, HUD acknowledged its anticipated challenges with respect to scaling staffing and other resources to provide adequate technical assistance and AFH review. *See* Final Rule, Affirmatively Furthering Fair Housing, 80 Fed. Reg. 42,272, 42,350 (July 16, 2015) (“HUD itself will need to hire staff to implement the rule; provide data support; and review submitted AFHs”); *see also* Bostic & Acolin, *supra* note 52, at 201–02 (describing HUD’s approach in the final rule).

254. *See, e.g.*, Bostic & Acolin, *supra* note 52, at 201–02.

255. *Id.*

256. *Id.*

HUD has always anticipated its need to scale upward as it rolls out the AFFH Rule. It is not a revelation that HUD has been planning to make internal changes to account for new demands. Second, HUD has strategies to cultivate a culture of local AFFH compliance. In addition to staggering submissions, HUD could randomize which submissions it reviews and which jurisdictions receive more intensive technical assistance in the early months and years of AFFH rollout. In short, lack of capacity alone does not handcuff HUD from taking meaningful steps to enforce the AFFH Rule. Finally, even in an administration that has not prioritized HUD funding,²⁵⁷ the fair housing office has been increasing staff during 2018–2020.²⁵⁸

Viewed another way, even assuming HUD does not have the current capacity to enforce an AFFH regulation to the fullest, it has the potential. We cannot know whether it will rise to the occasion until the opportunity arrives.

B. Voluntary Measures

Absent statutory amendment, or in the interim, advocates have other options to affirmatively further fair housing: State and local governments can voluntarily pursue their own AFFH policies.

The proposals discussed in this Section are separate and independent of federal authority. As such, they would not directly implicate federal grants, but they are promising for other—arguably superior—reasons. Where federalism leaves state and local governments to impose their own legal mandates, particularly in the areas of community development like zoning policy, such proposals are less likely to raise the same concerns about top-down control as federal mandates. They may be better tailored to the unique jurisdiction, and the very process of enacting these measures would generate and demonstrate a degree of local support.

Nothing in federal law prohibits states and localities from pursuing their own AFFH mandates. Federal prohibitions restrict federal (not local)

257. *E.g.*, Administration Proposes to Cut HUD Budget by \$8.6 Billion, AFFORDABLE HOUSING FINANCE (Feb. 10, 2020), https://www.housingfinance.com/finance/administration-proposes-to-cut-hud-budget-by-8-6-billion_o [<https://perma.cc/5C2X-ZKK9>] (reflecting a proposed 15 percent reduction).

258. Anna Maria Farias, Assistant Sec’y, Fair Hous. & Equal Opportunity, Dep’t of Hous. & Urban Dev., Remarks to Annual Symposium “Fair Housing 2019—New Challenges or More of the Same?,” at the University of Illinois-Chicago John Marshall Law School (September 5, 2019) (noting that HUD had added over 100 FHEO employees across the country) (notes on file with author).

authority from rewriting local zoning and similar regulations.²⁵⁹ Similarly, it is unlikely that any ideologically motivated anti-AFFH rulemaking would—or legally could—impinge on state or local authority to establish new local AFFH standards. Moreover, practically, AFFH opponents' deregulatory approach has entailed removing federal involvement for the sake of increasing local control, not restricting it.²⁶⁰

A state/local approach risks lack of uniformity and federal accountability. However, these proposals provide a backstop during periods of federal hostility to fair housing. They are therefore best seen as an alternative option to a HUD-promulgated AFFH rule. Ideally, Congress would set the gold standard through statutory amendment that allows states and localities flexibility to customize their AFFH procedures after satisfying minimum federal standards.

This Section looks at two existing models, but the possibilities are as broad as a community is creative.²⁶¹ These models are recent developments that appear to have been prompted by the federal government's AFFH hostility under the Trump Administration.

The first model is a state statute, illustrated by California's AFFH law.²⁶² The second model is voluntary completion of the AFH (even though it is no longer required) and incorporation of the AFH results into comprehensive planning documents. Several cities have already conducted or are considering AFHs as the time comes to renew their planning documents. Among them are Boston, the District of Columbia, and New Orleans.²⁶³

259. See, e.g., Preserving Community and Neighborhood Choice, 85 Fed. Reg. 47,899, 47,903 (Aug. 7, 2020) (citing 42 U.S.C. § 12711).

260. See, e.g., *id.* at 47,900.

261. The unleashed potential of state and local AFFH mandates is the subject of a forthcoming article.

262. California Affirmatively Furthering Fair Housing Act, Assembly Bill 686 (Sept. 30, 2018) (to be codified at 2 CAL. GOV'T CODE § 65583) (establishing a duty to affirmatively further fair housing under California state law).

263. See, e.g., *Hearing Before the Subcomm. on Civil Rights & Civil Liberties of the H. Comm. on Oversight & Reform*, 116th Cong. (2020) (Testimony of Ellen Lee, Director of Community and Economic Development for the City of New Orleans), <https://oversight.house.gov/legislation/hearings/a-threat-to-america-s-children-the-trump-administration-s-proposal-to-gut-fair> [<https://perma.cc/L7ZU-428X>] (video of testimony beginning at minute 32:00). A critical mass of additional jurisdictions are now adopting the AFH template, including the State of Delaware, the State of Connecticut, Orange County, California, the Minneapolis-Saint Paul Twin Cities metropolitan

Boston has gone a step further. Its City Council has pledged to adopt a first-in-the-nation zoning amendment requiring policymakers to conduct an analysis of barriers to fair housing as a part of its zoning approval process.²⁶⁴

Given these models, this Section focuses on how fair housing advocates might appeal to local grantees to voluntarily adopt one of these models by appealing to the jurisdiction's (1) self-interest and (2) fundamental shared values, even though not required by federal law. Specifically, this Article proposes that advocates employ strategic opportunity messaging, directed at local planners who influence AFFH decisions. Advocates might use these tools in traditional state and local lobbying efforts, ballot referenda, or

region, Baton Rouge, Louisiana, and a number of counties surrounding the District of Columbia (Arlington, Alexandria, Fairfax, Prince William, Loudoun, and Montgomery Counties). *See, e.g.*, Regional Fair Housing Project Team, Metropolitan Washington Council of Governments, <https://www.mwcog.org/committees/regional-fair-housing-project-team/> [<https://perma.cc/99TZ-H4ZN>] (discussing a multi-jurisdiction regional AFH approach); Prince William County Staff Report and Proposed Resolution on an Intergovernmental Collaboration Agreement to fulfill its AFFH duties, available at <https://eservice.pwcgov.org/documents/bocs/agendas/2020/0922/5-C.pdf> [<https://perma.cc/9HPR-BWD3>] (describing the nature of the analysis to fair housing impediments and desire to gather and examine data for patterns of racial bias and segregation even though it is no longer required under federal law). These themes also arose in conversations with fair housing advocates. *E.g.*, Interview with Nadine Cohen, Managing Att'y, Greater Bos. Legal Servs. (June 25, 2020) (notes on file with author).

264. *See Boston Commits to First-in-the-Nation Zoning Amendment Proposed by Councilor Lydia Edwards*, EAST BOSTON TIMES-FREE PRESS, June 24, 2020, <https://eastietimes.com/2020/06/24/boston-commits-to-first-in-the-nation-zoning-amendment-proposed-by-councilor-lydia-edwards> [<https://perma.cc/Y5K6-MJLF>]. This work is a result of a years-long effort by the Affirmatively Furthering Fair Housing Community Advisory Committee in partnership with—and consistent advocacy by—a diverse coalition of stakeholders. *See* Telephone Interview with Nadine Cohen, Managing Att'y, Greater Bos. Legal Servs. (June 25, 2020); Nadine Cohen, Presentation to Fair Housing Conference San Diego (Feb. 14, 2020) (notes on file with author).

In New York, under Governor Andrew Cuomo's statewide "Fair Housing Matters NY" program, the state is pressing forward with local data collection every three to five years as required under the AFFH Rule. *See, e.g.*, Matthew Chayes, *State Asks Public to Complete Fair Housing Surveys*, NEWSWEEK (July 13, 2020), <https://www.newsday.com/long-island/fair-housing-segregation-cuomo-surveys-1.46818103> [<https://perma.cc/74DV-FEJ3>].

training at annual fair housing conferences for local planners, among other efforts. This Article is cognizant that voluntary measures may produce more modest results than federal reform. But all local progress contributes to building a culture of AFFH compliance. This Section explores messages most likely to stimulate local commitment.

For the past decade, The Opportunity Agenda—which describes itself as “an intersectional communication lab”²⁶⁵ that studies how to tell compelling stories about issues of national importance—has studied messaging about the AFFH mandate.²⁶⁶ Its research reveals effective ways to engage various audiences on the issue of how to use local government processes to decrease residential segregation, focused on core values. The cornerstone of its approach is educating its audience of the *importance of place* in determining life outcomes, because where one lives is correlated with opportunity.²⁶⁷ This tactic helps local decision-makers understand not only their considerable influence but the cause-effect relationship between local land use, zoning, and related decisions and quality of life.²⁶⁸ From there, the messaging focuses on policies that promote opportunity, with emphasis on common values.²⁶⁹ This Section contends that fair housing advocates and strategic partners can use this messaging at fair housing trainings to show local decision-makers how they can use AFFH tools—regardless of whether the federal government requires them—to improve outcomes for their unique communities, particularly when they understand

265. THE OPPORTUNITY AGENDA, <https://www.opportunityagenda.org> [https://perma.cc/A4U4-XEBG].

266. *E.g.*, *Expanding Opportunity: Talking about HUD's Affirmatively Furthering Fair Housing Regulations*, THE OPPORTUNITY AGENDA (2017), <https://www.opportunityagenda.org/sites/default/files/2017-03/Expanding%20Opportunity.pdf> [https://perma.cc/RJ7W-N9QU] (hereinafter *Expanding Opportunity*); *Realizing the Promise: How to Affirmatively Further Fair Housing*, THE OPPORTUNITY AGENDA (Nov. 2014), https://www.opportunityagenda.org/sites/default/files/2018-04/2014.11.10_realizing_the_promise_final.pdf [https://perma.cc/S4WN-5GYR]; The Opportunity Agenda, *Reforming HUD's Regulations to Affirmatively Further Fair Housing* (March 2010), <https://www.opportunityagenda.org/sites/default/files/2017-03/2010.03ReformingHUDRegulations.pdf> [https://perma.cc/9Q4Q-4MPP].

267. *Expanding Opportunity*, *supra* note 266, at 4.

268. *E.g.*, *id.* at 9.

269. *Id.* at 1, 2, and 6.

the staggering costs of segregation on quality of life and other costly government services.

Opportunity Agenda identifies six core themes.²⁷⁰ This Article focuses on the three likely to resonate with local decision-makers: (1) opportunity for all, (2) a tool to combat growing inequality, and (3) accountability and the public trust.

The first theme—opportunity for all—draws on commonly held belief of equal access to opportunity.²⁷¹ The message is that where you live has a significant impact on your life, such as quality schools or transportation or jobs, factors that vary dramatically by neighborhood. The purpose of the AFFH is to broaden access to opportunity to all people—regardless of race or ethnicity.²⁷²

The second theme is that the AFFH Rule is a tool for local governments to combat growing inequality.²⁷³ It emphasizes America's growing racial and ethnic inequality, an alarming trend that shows unequal opportunity is spreading, not decreasing.²⁷⁴ It underscores the unique influence local leaders wield with respect to barriers to opportunity, not just intentional bigotry but bad local policies or practices.²⁷⁵

Finally, the third theme is about accountability and the public trust. The message is that local entities that ask for federal taxpayer funds for housing and community development projects have an obligation to administer those funds with an eye toward expanding opportunity, not limiting it. It means that funding recipients make an informed choice: accept federal funds, which come with planning tools and data, in exchange for the promise that the community will consider fair housing in their development and takes steps to reduce barriers to housing opportunity.

270. *Id.* at 3–5.

271. *Id.* at 3.

272. *Id.*

273. *Id.* at 3–4; *see also* Orfield & Stancil, *supra* note 34 (discussing the economic self-interest of communities to reduce residential segregation) (“This all echoes a deeper truth: Racially segregated regions don’t work. They’re politically and economically unstable. They result in societies where people can’t understand each other or work together. Research shows that segregation can create and reinforce stereotypes and that it erodes people’s ability to interact across racial lines. Segregated cities are more likely to produce racism not just within the police force but throughout any political or civic institution with power.”).

274. *Expanding Opportunity*, *supra* note 266, at 3–4.

275. *Id.*

These themes provide a foundation to approach local decision-makers, many of whom are largely unaware of the purpose or function of the AFFH mandate. Voluntary compliance is more likely where the local decisionmaker understands the unique opportunities the AFFH mandate presents. Using the AFFH Rule (2015) as a proxy, Opportunity Agenda suggests nine opportunity themes.²⁷⁶ Among them are: deeper local understanding (by using data, helping jurisdictions understand local conditions in terms of access to schools, jobs, transportation, and a healthy environment), local flexibility (providing a stronger analytical framework that highlights which issues to examine without dictating a one-size-fits-all approach to planning), and better coordination (drawing connections between a jurisdiction's fair housing priorities with its other development resources like its Consolidated Plan or other broader regional issues like transportation or infrastructure).²⁷⁷

Connecting these messages to outcomes, advocates might ask decisionmakers to adopt a formal AFFH mandate for their jurisdiction. The primary example is California's AFFH mandate, which went into effect in 2019.²⁷⁸ Similar to the federal AFFH Rule, the law creates a statewide affirmative fair housing obligation to address segregation, defining the phrase "affirmatively further fair housing" to require meaningful actions to "overcome patterns of segregation and foster inclusive communities free from barriers that restrict access to opportunity" for communities of color and other persons protected by state law.²⁷⁹ It requires all levels of state and local government and public housing authorities to administer their housing and community development programs in a way that affirmatively furthers fair housing and requires that the obligation be interpreted consistent with the federal AFFH Rule as promulgated in 2015.²⁸⁰ Additionally, California requires every jurisdiction to include a "Housing Element" in its local development plan, which includes an analysis of both segregation and residential displacement.²⁸¹ This is a requirement that any

276. *Id.* at 9.

277. *Id.*

278. California Affirmatively Furthering Fair Housing Act, Assembly Bill 686 (Sept. 30, 2018) (to be codified at CAL. GOV'T CODE § 65583, §8899.50) *see* Renee M. Williams, *Affirmatively Further Fair Housing: California's Response to a Changing Federal Landscape*, 28 J. AFFORDABLE HOUS. & CMTY. DEV. L. 387 (2019).

279. CAL. GOV'T CODE § 8899.50(a)(1) (West 2020)

280. CAL. GOV'T CODE § 65583 (West 2020)

281. *Id.*

state or local jurisdiction could add to its existing planning process, unless otherwise prohibited by state law.

A second option that does not necessarily require a legislative vote is for a jurisdiction to voluntarily adopt new planning protocols that explicitly consider AFFH elements. Three strategies are likely to be the most effective.²⁸² First, jurisdictions should voluntarily complete the Assessment of Fair Housing process outlined in the AFFH Rule, rather than a mere Analysis of Impediments. This entails using the Assessment Tools and HUD-supplied data to undergo a more thoughtful and customized analysis of impediments in that jurisdiction.²⁸³ Second, jurisdictions should explicitly incorporate their fair housing goals into their Consolidated Plans or PHA Plans for coordinated planning that reflects fair housing priorities. Third, jurisdictions should measure and publicly report progress—and lack of progress—toward meeting their AFFH goals.

The best methods for disseminating these messages is beyond the scope of this Article. As previewed above, legislative lobbying efforts, state or local ballot referenda, conferences or local planners, or continuing education programs are potential entry points to attract local interest. State and local governments are classic laboratories for local experimentation, and they present at least some opportunity to see how AFFH-focused planning results in better outcomes and long-term cost savings. At the same time, advocates must remain mindful that, historically, local compliance has not been forthcoming. As this Article states in the introduction: progress must occur at the local level, but history has proven that local compliance often requires federal pressure and accountability. Accordingly, state and local measures present opportunity, but they cannot be the stopping point.

282. For policy recommendations based on current trends in fair housing, see NAT'L FAIR HOUS. ALL., *supra* note 246, at 93.

283. Some jurisdictions are leading by example, preparing the equivalent of the enhanced Assessment of Fair Housing (AFH) instead of an Analysis of Impediments. *See, e.g.*, Washington, D.C. Fair Housing Analysis, POVERTY & RACE RESEARCH ACTION COUNCIL (2019) <https://prrac.org/washington-dc-fair-housing-analysis-2019/> [<https://perma.cc/8N5E-DG4Y>] (prepared by a collaboration of the Poverty & Race Research Action Council, Lawyers' Committee for Civil Rights Under Law and D.C. Department of Housing and Community Development); *see also Hearing Before the Subcomm. on Civil Rights & Civil Liberties of the H. Comm. on Oversight & Reform, supra* note 263 (testimony of Ellen Lee on the experience of New Orleans with the AFH process and the voluntary steps it is taking to carry out is AFH goals).

CONCLUSION

The AFFH mandate—the car nobody knew how to drive—is a one-of-a-kind civil rights directive requiring the federal government and its grantees to take affirmative steps to deconstruct the segregation the government built.²⁸⁴ It languished nearly fifty years before HUD paid it meaningful attention. The resulting 2015 AFFH Rule was a vital step that illustrates what can and must be done to make progress against housing segregation. But the 2020 repeal of the AFFH Rule has set advocates back, potentially decades. Its repeal illustrates the vulnerability of any AFFH regulation.

To be effective, the contours of the AFFH mandate should be memorialized in statute. This Article makes the case for amending the Fair Housing Act to give meaning to the AFFH mandate by establishing an accountability framework and creating a private right of action as a backstop to government inaction. The time is upon us. The stage is set for fair housing's third act.

284. Hannah-Jones, *supra* note 8 (quoting a senior fair housing official on the lack of AFFH guidance within HUD).